Judgments of the Administrative Tribunal of the International Labour Organization:

80th Session

(October 1995 - February 1996)

International Labour Office
Geneva

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The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

- International Labour Organization, including the International Training Centre
- World Health Organization (WHO), including the Pan American Health Organization (PAHO)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- International Telecommunication Union (ITU)
- World Meteorological Organization (WMO)
- Food and Agriculture Organization of the United Nations (FAO)
- European Organization for Nuclear Research (CERN)
- General Agreement on Tariffs and Trade (GATT)
- International Atomic Energy Agency (IAEA)
- World Intellectual Property Organization (WIPO)
- European Organisation for the Safety of Air Navigation (Eurocontrol)
- Universal Postal Union (UPU)
- European Patent Organisation (EPO)
- European Southern Observatory (ESO)
- Intergovernmental Council of Copper-Exporting Countries (CIPEC)
- European Free Trade Association (EFTA)
- Inter-Parliamentary Union (IPU)
- European Molecular Biology Laboratory (EMBL)
- World Tourism Organization (WTO)
- African Training and Research Centre in Administration for Development (CAFRAD)
- Intergovernmental Organisation for International Carriage by Rail (OTIF)
- International Center for the Registration of Serials (CIEPS)
- International Office of Epizootics (OIE)
- United Nations Industrial Development Organization (UNIDO)
- International Criminal Police Organization (Interpol)
- International Fund for Agricultural Development (IFAD)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Customs Co-operation Council (CCC)
- Court of Justice of the European Free Trade Association (EFTA Court)
- Surveillance Authority of the European Free Trade Association (ESA)

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re LUSTIG DE SCHÖNSTEIN

Judgment 1464

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sonia Lustig de Schönstein against the United Nations Industrial Development Organization (UNIDO) on 5 February 1995 and corrected on 14 March, UNIDO's reply of 16 June, the complainant's rejoinder of 21 July, the supplement thereto of 18 September and the Organization's surrejoinder of 13 October 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Chile and Germany, joined UNIDO's staff in October 1971 under the first of a series of short-term appointments that ran until June 1972. In September 1972 UNIDO granted her a fixed-term appointment as a typist at grade G.3. It promoted her to G.4 in 1973, to G.5 in 1976 and to G.6 in 1986 as a senior secretary. It granted her a permanent appointment on 1 August 1975. As from April 1991, when it brought in a new grading system, it put her back to grade G.5.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division informed her that because of a review of "priority programmes and staffing requirements" her appointment was "likely to be terminated in the near future" and there would "shortly" be talks with her about "the modalities of separation".

On 8 November 1993 she fell ill and the medical service advised her to go home. She went into hospital and in a letter of 19 November 1993 her doctor in Vienna told the head of the Organization's medical service that he attributed her ailment, intestinal ulcers, to "stress" at the workplace.

In a memorandum of 6 December 1993 to the secretary of the Advisory Board on Compensation Claims she sought compensation for total disability due to the performance of official duties.

There followed correspondence between the parties about her claim and about her entitlement to sick leave pending a determination by the Board about the cause of her illness.

In a letter dated 15 March 1994 the secretary of the Board told her that by 22 November 1993 she had exhausted her entitlement to sick leave on full pay but that by taking half days from her annual leave entitlement she could stay on full pay "until June". In a letter of 21 June 1994 the secretary informed her that she was on sick leave with half pay as from 17 June.

By a letter dated 14 July 1994 she asked the Director-General to review that decision. In his reply of 22 August he said that the Board would examine her case at its next meeting and pointed out that the reckoning of her entitlement to sick leave depended on its recommendation.

According to a personnel action form dated 26 September 1994 she was put on "special leave with half pay" as from 21 September in accordance with circular UNIDO/DA/PS/AC.77.

By a letter of 12 October 1994 the Director-General endorsed a unanimous recommendation from the Board that he should not treat her illness as service incurred; he also upheld the earlier reckoning of her entitlement to sick leave.

In a letter of 10 November 1994 she asked the Director-General to review his decision of 12 October. He informed her in a letter of 8 December that he was referring her case to the Advisory Board on Compensation Claims, which would set up a medical board. According to a personnel action form of 14 August 1995 she was put on special leave without pay as from 1 August 1995.

B. The complainant infers rejection of the claim she lodged on 10 November 1994 from the Organization's failure to take a decision within sixty days. She says that its treatment of her claim was dilatory and it overlooked the evidence that shows her illness to be due to the performance of official duties.

She wants the Tribunal to recognise her entitlement to compensation for service-incurred illness, including payment of 12 months' pensionable remuneration, the refund of related medical expenses, payment of salary and allowances for a full year as from the onset of her illness, the grant of special leave with full pay as from the time she exhausted her entitlement to sick leave, and compensation "related to benefits under the United Nations Joint Staff Pension Fund". She has subsidiary claims to the refund of medical expenses she incurred because of the "belated convening" of a medical board;

to credit for accrued annual leave and sick leave; to payment of interest on all sums due; and to repayment of sums she made over to her bank by way of interest on her overdraft. She claims the production of several documents, "reinstatement" in some other United Nations agency in Vienna and awards of "physical, moral and material damages" and costs.

C. In its reply UNIDO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies open to her. The Director-General's letter of 8 December 1994, in which he gave her information about the applicable procedure, was plainly a decision. The Organization observes that, though still pending, her claims have suffered no untoward delay.

D. In her rejoinder the complainant insists that UNIDO has followed a "delaying policy" and acted in breach of "all" the material rules. She lodges a supplementary claim to the rescinding of the personnel action form issued on 14 August 1995 on the grounds that it failed to specify that special leave without pay was granted under the terms of circular UNIDO/DA/PS/AC.77. She also asks for the continuance of benefits under the temporary disability insurance plan pending award of a disability grant under the Pension Fund.

E. In its surrejoinder the Organization rejects her additional claims as irreceivable on the grounds that they amount to a fresh complaint impugning different decisions. It presses its other objections to receivability and observes that only a medical board, not her own doctors, may determine whether her illness was service incurred.

CONSIDERATIONS:

1. The complainant, who has worked for the Organization since 1971, holds a permanent appointment at grade G.5. She was granted sick leave in November 1993 and was put on special leave at half pay on 21 September 1994.

2. On 6 December 1993 she had lodged a claim under Appendix D of the Staff Rules to the grant of compensation for illness on the grounds that it was service incurred. There was some delay in getting additional medical information from her doctor, who did not provide it until 17 June 1994. The Advisory Board on Compensation Claims took up her claim on 14 September 1994. It unanimously concluded that her illness

was not "attributable to the performance of official duties" and therefore recommended refusing her claim to compensation under Appendix D of the Staff Rules. By a letter of 12 October 1994 the Director-General informed her that he had approved the Board's recommendation.

3. Article 17 of Appendix D reads:

"(a) Reconsideration of the determination by the Director-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability, may be requested within thirty days of notice of the decision provided, however, that in exceptional circumstances the Director-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him or her on the medical board provided for under paragraph (b).

(b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Officer of the Organization or a medical practitioner selected by him or her; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the Organization.

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with a report of the medical board to the Director-General who shall make the final determination."

Clauses (d) and (e) are not material.

4. By a letter of 10 November 1994 to the Director-General the complainant appealed against his decision of 12 October in accordance with Article 17 of Appendix D and named a doctor to represent her on the medical board provided for under paragraph (b) of that article. She asked what were the "criteria and substantial justification that led to the denial of compensation under Appendix D".

5. The Director-General replied in a letter of 8 December acknowledging hers of 10 November as well as another one she had written to him on 5 November. He refused to make the Board's minutes available to her on the grounds that they were "confidential"; said that he had reviewed the matter but was maintaining his decision; and acknowledged receipt of her appeal, which he said would be "brought to the attention of the

Advisory Board on Compensation Claims for appropriate action concerning the convening of a medical board". She wrote again on 30 December 1994 and in a letter of 26 January 1995 in reply the Director-General confirmed his refusal to make the Board's "internal documentation" available but promised that the Board would deal with her case "as expeditiously as possible".

6. She lodged this complaint on 5 February 1995 claiming compensation for service-incurred illness and related supplementary relief and seeking disclosure of the "internal documentation" refused in the Director-General's letter of 26 January 1995. She seeks to justify resorting to the Tribunal on the grounds of implied rejection of the claim she made in her letter of 10 November 1994 in accordance with Article 17 of Appendix D. She contends that the Director-General's reply of 8 December 1994 merely acknowledged receipt and did not amount to a decision. Observing that Appendix D sets no time limits for the appeal procedure, she argues that the Organization has failed to take any decision within the time limit in Article VII(3) of the Tribunal's Statute, viz. within sixty days of the date of notification of her claim of 10 November 1994, and that her complaint is as receivable as if it were challenging an express final decision.

7. The Organization retorts that the complaint is irreceivable because there is no implied rejection of her claim: the Director-General's letter of 8 December 1994 did contain a decision, and that decision was to deal with the matter in accordance with Article 17. The Organization points out that her appeal was put to the Advisory Board and therefore went ahead. At a meeting on 11 April 1995 the Board postponed the convening of a medical board pending a decision by the Standing Committee of the United Nations Joint Staff Pension Board on her claim to a disability benefit.

8. While her claim to compensation for service-incurred illness was taking the course outlined above correspondence went on between her and the Organization about entitlements to sick leave, annual leave and payment of a disability benefit by the United Nations Joint Staff Pension Fund. None of those questions is material to the claims now at issue. In particular the Pension Board's decision was taken after the filing of the complaint and is therefore irrelevant to her case.

9. There is no substance to the complainant's argument that the Director-General's letter of 8 December 1994 did not constitute a decision but was a mere acknowledgment of receipt. It is plain from that letter that he was treating her letter of 10 November as a formal appeal under Article 17 and setting in train the procedure for convening a medical board. Since the letter amounted to a decision to follow the process of appeal under Article 17 there was no implied rejection.

10. The Tribunal has stated many times that in accordance with Article VII(1) of its Statute a complaint will not be receivable unless the internal means of redress are exhausted and the final decision notified. The complainant contends that her complaint is receivable because she may act under Article VII(3), the Organization having failed to take its decision on her appeal within the sixty days' time limit set in that provision. But her reading of VII(3) is mistaken. It does not require that the process of appeal be completed within sixty days. The process must follow its course, and that entails convening the medical board and having it report to the Advisory Board. That Board will then transmit its recommendations, together with the medical board's report, to the Director-General for a final determination.

11. The complainant alleges, and the Organization denies, delay in dealing with her initial claim. But that issue has no bearing on the receivability of her complaint, which depends on whether or not there has been implied rejection.

12. There is, however, one aspect of her claim which must be distinguished. The Director-General specifically refused in his letter of 8 December 1994 her application for disclosure, and did so again in his letter of 26 January 1995. Having made no internal appeal against that decision she has not exhausted her internal remedies insofar as they relate to that matter and her complaint is irreceivable to that extent. Her failure to realise that appeals would lie on different issues may result in a breach of due process. But the difficulty might be overcome if the doctor she named to sit on the medical board were to ask for disclosure of all the relevant records.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SAUNDERS (No. 12)
(Application for review)

Judgment 1465

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1303 filed by Mr. Yann Harris Saunders on 30 November 1994, the reply of 17 February 1995 of the International Telecommunication Union (ITU), the complainant's rejoinder of 3 March and the Union's surrejoinder of 7 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. This is an application for review of Judgment 1303 of 31 January 1994 whereby the Tribunal dismissed the complainant's eighth complaint. In his pleadings on that case he contended that the ITU had acted in breach of the rule of equal pay for work of equal value by paying him a salary lower than that of another official whom it had recruited to the General Service category of staff in the same grade. The Tribunal ruled that the other official was not in the same factual situation as he. It held that he was unable to show any failure by the Union to observe the terms of his appointment or any breach by it of the Staff Regulations or Rules.

2. In this application he submits that the Tribunal overlooked several essential facts which may have led it to draw mistaken conclusions.

3. The documents he has filed with his application add nothing to the facts brought to the Tribunal's notice in the proceedings that led to Judgment 1303. They reveal no material fact which the complainant discovered too late to be able to cite in those proceedings. Indeed the only reason why he is relying on them now is, on his own admission, that he believes

they support the submissions he made in his eighth complaint. In any event his plea that the Tribunal overlooked essential facts cannot succeed because the documents merely confirm an administrative situation which the Tribunal took into account in giving judgment.

4. In his rejoinder he relies on another two "new facts" which relate to two colleagues of his and which he says he discovered in January 1995. But neither of those two staff members was in the same situation as he, and so the facts he describes as "new" are not material.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SAUNDERS (No. 13) Judgment 1466

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 30 November 1994, the ITU's reply of 17 February 1995, the complainant's rejoinder of 3 March and the Union's surrejoinder of 7 April 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career at the Union has appeared under A in Judgments 970, 989 and 1018.

Like his tenth complaint, on which the Tribunal ruled in Judgment 1422, this dispute arises out of the complainant's discovery of what he sees as a procedural defect in competitions the Union held to fill two vacancies at grade G.7 in 1990 and 1991. In letters dated 18 December 1990 and 27 March 1991 the Chief of the Personnel Department told the complainant, who had applied for both posts, that his applications had not been successful.

By a memorandum of 15 June 1994 the complainant asked the chairman of the Appointment and Promotion Board to tell him who had sat on the Board that had examined his applications for the posts. After receiving the chairman's reply of 20 June he asked the Secretary-General in a letter of even date to review the appointments he had made to those posts on the grounds that the grade of one of the Board's members had not been equal to or higher than that of the vacant posts. By a memorandum of 28 July the Secretary-General rejected his request as time-barred.

The complainant put his case to the Appeal Board on 5 August 1994. The Board recommended rejecting his appeal in a report dated 1 November. In a memorandum of 15 November 1994, the impugned decision, the Secretary-General upheld his earlier decision.

B. The complainant submits that the exceptional circumstances of his case warrant waiver of the time limit for appeal. He could not have gained knowledge of the Union's breach of procedure in time. What is more, the breach was "deliberate" and recurred several times.

On the merits he observes that, although decisions on appointments are discretionary, the Tribunal will quash them for breach of a procedural rule.

He accordingly seeks the quashing of the appointments; moral and material damages in an amount equal to the difference between his pay and what he would have got at the highest step in grade G.7 as from the date of the appointments; the reckoning of his salary and entitlements at the highest step in grade G.7 at non-local rates or, failing that, a "transitional allowance" equal to the difference between his pay at step 12 of P.2 and what he would have got at step 12 in G.7; compensation for any loss of pension entitlements as a P.2; and an award of costs.

C. In its reply the ITU contends that the complaint is irreceivable because the complainant failed to appeal within the six-week time limit set in Staff Rule 11.1.1.2 a). It is plain from the case law that time limits apply even if the decision under challenge is tainted with a procedural flaw. In any event the burden was on the complainant to gather the information necessary for his appeal within the available time.

On the merits the Union acknowledges that there was "a slight procedural irregularity" but denies that it had any causal bearing on the complainant's failure to win the competitions.

D. In his rejoinder the complainant contests the Union's pleas on receivability and maintains that, however "slight" the flaw, a decision that offends against the rules must be set aside. He presses his claims and asks the Tribunal to order the ITU to inform all the unsuccessful applicants for the two posts of the "procedural irregularity in the selection process which entitles them to appeal against the decision to reject their application and ... claim damages".

E. In its surrejoinder the Union presses its arguments in the reply, objecting to what it calls a display of "bad taste" in the rejoinder.

CONSIDERATIONS:

1. The complainant applied for two vacant posts at grade G.7 which the ITU had advertised in October 1990 and January 1991. The Union informed him by letters of 18 December 1990 and 27 March 1991 that his applications had not been successful. He did not ask for review of either of those decisions within the time limit of six weeks set by Staff Rule 11.1.1.2 a).

2. As is recounted in Judgment 1422, under 1 and 2, he applied for another G.7 post on 23 April 1993. That application too having proved unsuccessful, he made an appeal on 30 November 1993 which went to the Appeal Board. In its report the Board upheld his contention that one of the members of the Appointment and Promotion Board had not, as Staff Regulation 4.9 e) required, held a post at a grade "at least equal" to that of the vacant post and that that Board had therefore been improperly constituted. On 21 July 1994 the Secretary-General accordingly reversed the appointment he had challenged and directed the Appointment and Promotion Board to proceed de novo. The complainant impugned that decision in his tenth complaint, which he filed on 10 August 1994. The Tribunal dismissed the complaint in Judgment 1422.

3. On 15 June 1994, while the proceedings in the tenth complaint were still pending, the complainant addressed an inquiry to the chairman of the Appointment and Promotion Board about the composition of the Board that had considered his two applications of October 1990 and January 1991 for G.7 posts. He discovered from the chairman's reply of 20 June 1994 that the Board had been improperly constituted, for the same reason, on those occasions as well. He thereupon sent the Secretary-General the very same day a request for review of the decisions of 18 December 1990 and 27 March 1991 rejecting those applications. In his reply of 28 July 1994 the Secretary-General rejected his request on the grounds that he had failed to observe the time limit of six weeks in Rule 11.1.1.2 a) and it was therefore time-barred. On 5 August 1994 he appealed to the Appeal Board. In its report of 1 November 1994 that Board too held that his appeal was time-barred and recommended rejection. By a memorandum of 15 November 1994, the decision impugned, the Secretary-General accordingly rejected his appeal.

4. The material issue is whether, as the complainant contends, the time limit of six weeks in Rule 11.1.1.2 a) is to be reckoned, not from the dates of notification of the decisions of 18 December 1990 and 27 March 1991, but from 20 June 1994, the date at which he discovered the defects in the membership of the Board.

5. Precedent has it that a time limit is a matter of objective fact and begins to run when a decision is notified. If that were not so, whatever considerations of equity there might be, there could be no certainty in legal relations between the parties, and such certainty is the whole purpose of time limits: see Judgments 752 (in re Goldschmidt) and 955 (in re Pineau), both under 4, and 603 (in re Grant), under 3. The only exceptions that the Tribunal has allowed are where the complainant has been prevented by vis major from learning of the decision (see Judgment 21: in re Bernstein) and where the defendant has misled him or withheld some document from him in breach of good faith (see Judgment 752).

6. It is therefore immaterial that the complainant discovered too late new facts that, in his submission, showed the decisions of 1990 and 1991 to have been unlawful.

7. The complainant seeks to get round the difficulty by accusing the Union of bad faith. His argument is that it has repeatedly violated the same Staff Regulation, 4.9 e), and must therefore be presumed to have committed the same error deliberately. The defendant admits in its reply that an error was made in the procedure of selection for the posts in question, but says that it was due to a mere oversight: one Board member did hold a post at a grade lower than that of the vacant posts, but had been put on a G.7 post and so had been granted the special post allowance at that grade; and everyone concerned had lost sight of the fact that she did not herself have the required grade.

8. The Tribunal sees no reason to question the Union's explanation and is satisfied on the evidence that the Union has not misled the complainant or shown him bad faith such as to warrant the derogation he seeks.

9. The complaint must therefore fail because it is irreceivable under Article VII(1) of the Tribunal's Statute, the internal procedure of appeal not having been duly followed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SAUNDERS (No. 14)
(Application for review)

Judgment 1467

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1093 filed by Mr. Yann Harris Saunders on 2 March 1995, the reply of 28 April of the International Telecommunication Union (ITU), the complainant's rejoinder of 30 May and the Union's surrejoinder of 20 June 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. This is an application for review of Judgment 1093 of 29 January 1991, which was about Mr. Saunders's third complaint. In that complaint he made the claim that his pensionable remuneration should be set at least at the level it would have reached at grade G.7 immediately before 1 January 1986, the date at which the ITU had granted him grade P.2. The Tribunal held that the grade of his permanent appointment up to the date of his attaining grade P.2 had been G.5 and not G.7. It accordingly dismissed his complaint.

2. In this application he says that he discovered in January 1995 that another official who had held grade G.6 before being promoted to P.2 on 1 January 1986 had had her pay reckoned on the strength of rates pertaining to grade G.7. He puts that forward as a new fact of which he was unaware at the time of the pleadings in his third complaint and which, had it then been known, would have swayed the Tribunal's ruling.

3. In its reply the Union points out that the official who had held grade G.6 had in 1979 been granted a special post allowance corresponding to G.7; in 1983 it granted her a special post allowance corresponding to P.2; in order to meet the requirements of Staff Rule 3.4.2.3 b) (formerly 3.4.2 c)) her pensionable remuneration was set as from 1 August 1984 at

the rates corresponding to G.7; and the reason for the adjustment was that in the Union's view the change of the pensionable special post allowance from a grade in the General Service category to one in the Professional category amounts to promotion and is therefore covered by Staff Rule 3.4.2.3 b).

4. There is nothing in the case records to cast doubt on the accuracy of the Union's account of the other official's career. The complainant's situation was different. From September 1974 he was assigned to a P.2 post and was paid a P.2 special post allowance so that his pay came to the amount he would have earned if he had been promoted from his permanent grade of G.5 to the P.2 post. When he was transferred to a G.7 post in 1984 he kept his P.2 special post allowance. His substantive grade continued to be G.5 until he was appointed to his P.2 post with effect from 1 January 1986. His factual situation thus differed from the other official's in that he never held a G.7 post or a post with a G.7 special post allowance. The two different situations would produce different results when Staff Rule 3.4.2.3 b) was applied.

5. Since the facts on which the complainant relies afford no grounds for review of Judgment 1093, his application must fail.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SAUNDERS (No. 15)
(Interlocutory order)

Judgment 1468

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 9 March 1995 and corrected on 16 March, the ITU's reply of 5 May, the complainant's rejoinder of 18 May and the Union's surrejoinder of 20 June 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career at the ITU has appeared under A in Judgments 970, 989 and 1018. From March 1973 to September 1974 he worked in the Union's Fellowships Service. In January 1986 he was promoted to grade P.2.

By office memorandum No. 59 of 5 September 1994 the Administration informed its staff of the promotion of Mrs. Patricia Faccin to grade P.3 as head of the Fellowships Service as from 1 February 1994. While still an administrative assistant at grade G.7, she had taken on duties formerly assigned to the head of the Service after he had retired and the Union had decided to "freeze" his post pending restructuring. The Union later abolished his post and reclassified Mrs. Faccin's - from G.7 to P.3 - as from 1 February 1994. It was on a recommendation from the Coordination Committee that the Secretary-General decided to promote her to P.3.

Having learned of her promotion from the office memorandum, the complainant asked the Personnel Department in a memorandum dated 6 October 1994 for a copy of the corresponding vacancy notice.

By a memorandum of 19 October the Chief of the Personnel Department explained that the Union had reclassified her post and given it a new job description but had been unable to advertise the post of the former head because it had been "frozen at the time of his retirement".

On 20 October 1994 the complainant asked the Secretary-General to review under Staff Rule 11.1.1.2 a) the decision to make Mrs. Faccin head of the Service. In a memorandum of 2 December 1994 the Deputy Secretary-General upheld the decision.

On 4 December the complainant put the matter to the Appeal Board under Rule 11.1.1.2 b). In its report of 26 January 1995 the Board concluded that the problem he had raised did not affect him "directly", that the Secretary-General had acted "in keeping with his mandate", that the procedure "appeared to be in conformity with that followed in similar cases", and that the underlying issue was the same in this instance as in earlier appeals from the complainant. The Board again expressed the wish that the Union should seek a "fair solution" to his case.

By a memorandum dated 3 March 1995, the impugned decision, the Secretary-General told the complainant he was upholding the decision of 2 December 1994.

B. The complainant submits that the Union resorted to subterfuge to make Mrs. Faccin head of the Fellowships Service. Since Staff Regulation 4.8 c) provides that "selection for posts in grades P.1 and above ... shall be made on a competitive basis", the ITU should have advertised the post when it fell vacant upon the retirement of the previous head of the Service. But it decided to freeze the post, assigned the duties to Mrs. Faccin and then reclassified her own post. That deprived the complainant of the opportunity of competing for a vacancy he was qualified to fill.

He seeks material damages equivalent to the higher salary and pension entitlements he would have had as head of the Fellowships Service, an award of 20,000 Swiss francs in moral damages, and costs.

C. In its reply the ITU submits that it would have acted wrongly had it advertised and filled a P.3 post of which the duties were likely soon to change because of restructuring of the Service. It applied the proper procedure for reclassifying Mrs. Faccin's post, and the complainant's suggestion that he

stood a chance of winning the post in a competition is "far-fetched".

D. In his rejoinder the complainant alleges a pattern of prejudice against him that culminated in a promotion which enabled Mrs. Faccin to pass to P.3 over the head of the complainant despite his higher grade, seniority in the Professional category and first-hand knowledge of the Fellowships Service. In any event the Union's methods are at odds with the spirit of the rules on promotion.

E. In its surrejoinder the ITU presses the pleas in its reply.

CONSIDERATIONS:

1. The complainant joined the ITU in 1967. He got a permanent appointment in 1969 at grade G.5 and as from 1 March 1973 was seconded to a G.6 post as administrative assistant to Mr. A. Maggio, the head of the Fellowships Service. After a competition the Union appointed him in 1974 as administrative officer at grade P.1 in the Service, which he left in September 1974. In 1986 it promoted him to P.2.

2. Mr. Maggio retired in 1992. On 26 September 1994 the complainant found on his return from leave an office memorandum, No. 59 dated 5 September, announcing that Mrs. Patricia Faccin had been promoted to P.3 as head of the Service. Mrs. Faccin had been holding a G.7 post as administrative assistant in the Service. In a memorandum of 6 October to the Personnel Department the complainant asked for a copy of the notice of vacancy of the P.3 post. By a memorandum of 19 October the Chief of the Personnel Department replied:

> "Following Mr. Maggio's retirement on 1.1.1992, Mrs. Faccin was progressively called upon to carry out the duties of Head of the Fellowships Service ... along with her other duties. After a number of years, Mrs. Faccin's post was reclassified based on a new job description. The reclassification of her post and Mrs. Faccin's promotion were effective on 1.2.1994.
>
> As regards Mr. Maggio's post, it was frozen at the time of his retirement and consequently could by no means be advertised."

3. In a letter of 20 October 1994 the complainant put to the Secretary-General in accordance with Staff Rule 11.1.1.2 a) a request for review of the decision to promote Mrs. Faccin as head of the Service. He alleged, among other things, that to freeze Mr. Maggio's post, assign the duties to Mrs. Faccin, upgrade her post to P.3 and promote her to that grade was just a "stratagem" calculated to put her in charge of the Service without observing "the fundamental principles governing recruitment, appointment and promotion" embodied in the Staff Regulations.

4. By a memorandum of 2 December 1994 the Deputy Secretary-General informed the complainant that the decision stood. He said:

> "... Mrs. Faccin's promotion is in fact the result of the process of reclassification of a post, and of promotion of its incumbent, consecutive to the retirement of Mr. Maggio and to the progressive redistribution of some of his former functions to another post."

5. On 4 December 1994 the complainant submitted an appeal to the Appeal Board of the Union. In a memorandum dated 12 January 1995 to the Chairman of the Board the Secretary-General explained that the redistribution of Mr. Maggio's duties had taken place in the context of a restructuring of the Fellowships Service; the conclusion had been that "the G.7 post occupied by Mrs. Faccin, comprising her former duties and the responsibilities coming from Mr. Maggio's post which she had assumed de facto since the latter's retirement, should indeed be reclassified to the P.3 grade"; and the competent body, the Coordination Committee, had confirmed the reclassification as from 1 February 1994 and recommended promoting Mrs. Faccin to P.3. The Secretary-General had accordingly decided on 11 May 1994 to promote her as from 1 February 1994.

6. In its report of 26 January 1995 the Appeal Board held that the Secretary-General's decision did not directly affect the complainant and that the Secretary-General had acted within his powers and apparently in accordance with the practice in similar cases. The Secretary-General thereupon confirmed the decision of 2 December 1994 and so informed the complainant in a memorandum of 3 March 1995, the impugned decision.

7. In its reply to the complaint the Union further alleges that the post formerly held by the head of the Fellowships Service "has been frozen and finally abolished".

8. That post had been in existence for many years when Mr. Maggio retired. Though it was then apparently "frozen", the Union has adduced no evidence to show that it was abolished thereafter. Indeed, some time later, Mrs. Faccin was promoted to what appears to be the very same post. Yet the ITU says that it was a different one, namely Mrs. Faccin's own G.7 post, which, with some of Mr. Maggio's former duties added, had been reclassified to P.3.

9. The Tribunal will look to the substance regardless of the form. The material question is whether the post that now exists is the same post as before. Since the answer to that question may affect Mrs. Faccin adversely, she is invited to make such submissions to the Tribunal as she thinks fit, and to do so within thirty days of her receiving the text of the present judgment, which is an interlocutory order. The Union and the complainant may each file observations within a time limit of thirty days from the date of receipt of a copy of her submissions.

DECISION:

For the above reasons,

The Tribunal orders the further submissions set out in 9 above.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re PISSAREV

Judgment 1469

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Boris Panteleimonovich Pissarev against the International Atomic Energy Agency (IAEA) on 12 October 1994, the Agency's reply of 22 December 1994, the complainant's rejoinder of 14 February 1995 and the IAEA's surrejoinder of 27 March 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Russian who was born in 1922, joined the staff of the IAEA on 1 June 1962 under a two-year appointment as senior legal officer at grade P.5. The last of his three extensions of contract ran until 28 May 1967. The total period of his service fell three days short of five years.

During that period he was an "associate participant" in the United Nations Joint Staff Pension Fund and so had coverage for death and disability but not for retirement. He did not himself contribute to the Fund or get any withdrawal settlement upon separation. Only full participants in the Fund qualify for a pension, after five years' continuous service.

From 1977 the complainant was on the staff of the United Nations in Geneva. While there he became a full participant in the Fund but chose not to validate his prior non-contributory service at the Agency.

When he retired in 1982 a lump sum was transferred to the Government of the then Soviet Union in lieu of pension payments. At present he receives a state pension.

In a letter of 26 November 1993 he asked the Director General of the Agency to extend his final appointment

retroactively to the end of May 1967 to afford him the "benefits of participation" in the Fund.

By a letter of 19 January 1994 to the secretary of the Joint Appeals Board he gave notice of his intention to appeal if the Director General rejected his claim.

In a letter dated 1 February 1994 the Director General rejected it.

On 25 March he appealed to the Joint Appeals Board. In its report of 13 July 1994 the Board recommended rejecting his appeal on the grounds that it was time-barred.

By a letter of 21 July 1994 the acting Director General informed the complainant that he was endorsing the Board's recommendation. That is the decision impugned.

B. The complainant submits that the IAEA's refusal to extend his contract by three days wrongfully deprives him of pension entitlements. In Judgment 245 (in re Meyer), on which he relies, the Tribunal held that the Agency had improperly deprived another former official of a pension by refusing to extend his appointment by 13 days.

The complainant says that he put off submitting a claim not only because he was unwell in 1991 and 1992 but above all because it was the policy of his country, the then Soviet Union, to confiscate any pension entitlements he might have had from the Fund. That is also why he did not validate his service at the IAEA when he became a staff member of the United Nations at Geneva. His situation warrants waiver of the time limits, as is plain from the Fund's safeguarding in its Regulations benefits whose "exercise has been prevented by circumstances beyond the control of the beneficiary".

He seeks such retroactive extension of his appointment as will bring his total service at the Agency to five years and payment of a pension as from the date of his retirement, less any amounts he may owe for the purpose of validating non-contributory service. Failing that, he claims payment of "the maximum amount" of pension due to him "as a full participant" in the Fund from the date at which he retired. He also claims costs.

C. In its reply the Agency submits that the complaint is time-barred and in any event devoid of merit.

The complainant's internal appeal was over 26 years late and neither political circumstances nor the state of his health warrant waiving the time limit. He was free to challenge the decision in time, the political circumstances in his home country notwithstanding. His complaint is irreceivable for failure to exhaust his internal remedies.

On the merits the Agency points out that it had never given him grounds for expecting a long-term appointment of five years or more. He was aware of its policy and accepted the benefits of coverage as an associate participant in the Fund.

D. In his rejoinder the complainant describes himself as the victim both of a "system" which made it "dangerous" to claim a pension for service at the IAEA and of the Agency's refusal of a three-day extension. The system having disappeared, the Agency alone is liable for his loss of pension.

E. In its surrejoinder the IAEA maintains the arguments it put forward in the reply. It is not to blame for his drawing no pension from the Fund: had it extended his appointment to the full five years he would still not have qualified for a pension. Even if he had been a full member his entitlements would have been transferred to the Government of his country under the terms of its agreement with the Fund. So he had no reasonable expectation of the pension he is seeking.

CONSIDERATIONS:

1. The complainant, a citizen of the then Soviet Union, joined the staff of the IAEA, in Vienna, on 1 June 1962 as a senior legal officer at grade P.5. His initial appointment ran for two years to 31 May 1964. He was granted an extension of two years to 31 May 1966. On 18 February 1966 he applied for and got an 11-month extension, to 30 April 1967. His last extension was again made at his request, and his last day on the Agency's payroll was 28 May 1967.

2. In January 1977 he took up employment at the Office of the United Nations in Geneva.

3. He wrote a letter to the Agency on 7 June 1979 saying that it had deliberately shortened by a few days the last extension of his appointment with it so as to prevent his having a total period of service of five years. He maintained

that its intention had been to deprive him of the right to full participation in the United Nations Joint Staff Pension Fund, five years being the minimum period of service that qualifies a staff member for such participation. He asked for "detailed information concerning [his] service" so that he might submit a claim to the "re-establishment of [his] rights as a staff member with five years' service".

4. He received a letter dated 15 February 1980 from the acting Director of the Division of Personnel giving the dates of his appointments with the Agency and reminding him that he had been an associate participant in the Fund. The letter added that associate participation, which by then no longer existed, had provided "death and disability coverage for staff not expected to remain in service for longer than five years, thus not qualifying for retirement benefits".

5. The complainant wrote again on 8 September 1982 to the Division of Personnel saying that according to his recollection he had been paid "the total withdrawal amount from the Fund" on separation and asking what the exact amount had been.

6. The Director of the Division replied in a letter of 15 October 1982, again observing that he had been an associate participant in the Fund while serving with the Agency; as an associate participant he had paid no contributions to the Fund; nor had the Agency made any; and so "no cash withdrawal settlement" had been payable to him.

7. Not until 26 November 1993 did he make his next approach to the Agency. He then wrote a letter to the Director General making a request for review of his pension status and asking that his final appointment with the Agency be extended to the end of May 1967 so as to bring the total period of his service up to five years and entitle him to full participation in the Fund.

8. In answer to an inquiry the deputy secretary of the United Nations Joint Staff Pension Board informed the Director of the Agency's Legal Division by a letter of 14 January 1994 that at the time of his separation from the Agency the complainant had not been entitled to any benefits from the Fund; but that after serving one year on his later post with the United Nations in Geneva he could have become a full participant and within another year thereafter could have chosen to validate his "prior non-contributory service as an associate participant from 1962 to 1967".

9. The Director General wrote to the complainant on 1 February 1994 refusing the request for review in his letter

of 26 November 1993. The complainant submitted an appeal to the Joint Appeals Board on 25 March 1994.

10. Paragraphs (1) and (4) of Rule 12.01.1(D) read as follows:

"(1) A staff member who, under the terms of Provisional Staff Regulation 12.01, wishes to appeal against an administrative decision, shall, as a first step, address a letter to the Director General, requesting that the administrative decision be reviewed or reconsidered by him. Such a letter must be sent within two months from the time the staff member received notification of the decision in writing.

(4) An appeal shall not be considered by the Joint Appeals Board unless the above time limits have been met, provided that the Board may waive the time limits in exceptional circumstances."

11. In its report dated 13 July 1994 the Board held that the complainant had failed to observe the time limit of two months in Rule 12.01.1(D)(1). It then considered whether there were "exceptional circumstances" within the meaning of Rule 12.01.1(D)(4) which would warrant waiver of that time limit.

12. The Board considered the complainant's contention on that score that Judgment 245 (in re Meyer) was applicable. In that case a staff member of the Agency who had been a full participant in the Fund was denied a 13-day extension of contract that would have brought the total period of his service up to five years and so entitled him to the benefits of participation. He brought his appeal in time. Even though there had been neither infringement of his rights nor misuse of authority the Tribunal held that by causing the complainant serious loss unjustified by the need to safeguard any interest of the Agency the Director General had drawn mistaken conclusions from the evidence. Accordingly the Tribunal directed the Agency to grant the extension. Drawing several distinctions between that case and this, the Joint Appeals Board concluded that the complainant's circumstances were so different from Mr. Meyer's as to warrant no waiver of the time bar.

13. In particular the Board considered whether the complainant's status as a former civil servant of the Soviet Union constituted an exceptional circumstance warranting waiver. He had argued that he would have been forced to make over to the Soviet State Bank any pension entitlements he derived from service in the United Nations common system and that because he had therefore not expected to get a pension

himself he had neither bothered to contest the length of the extension in 1967 nor validated prior service as an associate participant when later given the chance to do so during employment by the United Nations in Geneva.

14. The Board concluded that it could not, some 27 years later, properly waive the requirements of the Staff Regulations and Rules when the former staff member, despite long-standing dissatisfaction with his situation, had never taken steps to contest the decision he was challenging. The Board observed that the rules must be equally applied to everyone and that the complainant's situation was probably due to his own omissions as well as to the policy of the former Soviet Government rather than to any action or omission on the Agency's part. In conclusion it found no exceptional circumstances under Rule 12.01.1(D)(4) which would merit waiver. It recommended rejecting his appeal as time-barred.

15. By a letter dated 21 July 1994 the Director General accordingly informed the complainant of the rejection of his request for review, and that is the decision impugned.

16. Article VII(1) of the Tribunal's Statute reads:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Under Rule 12.01.1(D)(1) the complainant was required to put his request for review to the Director General within two months of receiving notice of the decision to extend his last appointment to 28 May 1967. He failed to do so. To satisfy the requirement in Article VII(1) the complainant must not only follow the prescribed internal procedure for appeal, but follow it properly and in particular observe any time limit that may be set for the purpose for internal procedures. In this case the complainant brought his initial request for review 26 years after he had received notice of the decision.

17. The complainant's case is that the time limit should not apply to the situation in which he was in 1967, and which he likens to that of someone under some sort of duress. He also cites the Pension Fund's Rules and Regulations.

18. The complainant is not contending that the Soviet Government prevented him from challenging the decision not to extend further his final appointment. He merely argues that while the Soviet Union existed there was no point in his making any claim or taking any other action to get a pension from the

Agency since in the end he would never have received it himself anyway. The conclusion is that the reason why he did not appeal was not any duress the Government may have put on him but the fact that appeal would have brought him no personal benefit. This case is not about the former Soviet Union's practice of requiring citizens to cash pension entitlements from the Fund and have the proceeds paid to the State Bank, but about the complainant's failure to pursue the possibility of getting a pension. The complainant's plea of duress is not sustained. Nor can his ill health in 1991-92 serve to revive a claim which even by them was long since time-barred. Lastly, the Fund's Regulations and Rules do not fall within the Tribunal's competence.

19. The internal means of redress not being exhausted, the complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

Michel Gentot

Mella Carroll

Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re PLUGGE

Judgment 1470

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hubert Boudewyn Plugge against the European Patent Organisation (EPO) on 15 November 1994 and corrected on 24 November 1994, the EPO's reply of 10 February 1995, the complainant's rejoinder of 10 March, the Organisation's surrejoinder of 12 April, the complainant's further submissions of 11 August and the EPO's final comments of 19 September 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of both the Netherlands and New Zealand, has been employed by the EPO since July 1988.

By a letter of 26 May 1994 he asked the President of the European Patent Office, the secretariat of the EPO, to change his place of home leave from Hilversum, in the Netherlands, to Christchurch, in New Zealand. In a reply dated 13 June 1994 the Director of Personnel Administration provisionally approved the change to Christchurch and told him he was entitled against proof of payment to the refund of travel costs up to half the price of an airline ticket at the business class rate.

On 11 August the complainant lodged an appeal against the decision of 13 June seeking a final decision that would grant him revised conditions of refund and another six days' "travel time".

By a letter dated 20 October 1994 the Director of Personnel Administration gave him a final decision that maintained the place of home leave and the conditions set out in the provisional one of 13 June and said that he would have only another three days' travel time.

B. The complainant infers rejection of his internal appeal from the Administration's failure to answer it within two months. He submits that under the applicable provisions of the Service Regulations he was entitled to refund of the full price of air travel in economy class. He also cites two provisions whose effect is, in his submission, to increase the travel time due to him by three days each.

He claims the refund of the cost of travel on home leave in an amount equal to the price of "full tourist economy class tickets"; another six days' travel time; and 2,000 German marks in costs.

C. In its reply the EPO argues that the complaint is irreceivable. Insofar as his internal appeal sought a final decision, that of 20 October 1994 gave him satisfaction. As for his objections to the conditions of refund and the reckoning of travel time in the final decision, he failed to exhaust the internal remedies open to him by challenging that decision.

In subsidiary comments on the merits the Organisation submits that the refund of the costs of travel is limited to expenses actually incurred, and that travel generally costs about half as much in tourist as in business class. When actual costs are greater the EPO pays the difference.

As to his claim to "extra travel time", the complainant wrongly assumes that the two rules on travel time have a cumulative effect: after studying a similar claim from another official the Appeals Committee held the Administration's construction of the rules to be lawful.

D. In his rejoinder the complainant maintains that his complaint is receivable. The decision of 13 June 1994 is a challengeable one: only the conditions it referred to were provisional. The "similar" case to which the Organisation refers is unlike his own in fact. There is nothing in the two provisions on travel time to suggest that they do not have cumulative effect.

E. In its surrejoinder the EPO observes that there is no new argument in the rejoinder to make it change its position. It presses its earlier pleas and insists that the conditions in

the decision of 20 October 1994 comply with the letter and spirit of the Service Regulations.

F. In a further brief the complainant produces documents to show that what the EPO has passed off as a duty to travel in tourist class is merely one to use the class "immediately" below first class, namely business.

G. In comments on that brief the Organisation says that the cardinal rule in the Service Regulations is economy, and there are no exceptions for home leave.

CONSIDERATIONS:

1. The complainant joined the EPO in 1988. He has dual nationality, having been born in New Zealand and acquired Dutch nationality by descent. Hilversum, in the Netherlands, used to be the designated place where he might take home leave in accordance with Article 60(2) of the Service Regulations.

2. By a letter of 14 November 1989 he asked the Personnel Department whether he might use his home leave entitlement for the purpose of travel to New Zealand. The answer, dated 4 December 1989, was that he might do so but that the place of his home leave was still Hilversum and the costs and duration of travel would continue to be reckoned on that assumption.

3. On 26 May 1994 the complainant made a written request to the President of the Office to have the place of his home leave changed from Hilversum to Christchurch, in New Zealand. The Director of Personnel Administration replied in a letter of 13 June that the Administration approved his request, but that since "discussions within the Office" were still taking place about "home leave and the reimbursement of expenses" the approval should be regarded as provisional. Reimbursement would be granted on production of proof of actual expenses but would be limited to half the price of a business class ticket unless no ticket was obtainable on the "free market" within that limit.

4. On 11 August 1994 the complainant lodged an internal appeal against that decision. He contends that, not having received any answer to that appeal within sixty days he may infer that it has been rejected and file a complaint with the

Tribunal in accordance with Article 109(3) of the Service Regulations and Article VII(3) of the Tribunal's Statute. The relief he seeks is the refund of the costs of travel to Christchurch on home leave at the rate of "full tourist economy class tickets" and the grant of a total of six days for such travel.

5. The final decision on those claims - as to the costs and duration of travel - was contained in a letter which the Director of Personnel Administration wrote to him on 20 October 1994 and which superseded the provisional decision of 13 June 1994. Since he made no internal appeal against the decision of 20 October the complaint is irreceivable under Article VII(1) of the Tribunal's Statute in that he has failed to exhaust the internal means that were available to him for resisting that decision. The Tribunal need not therefore entertain either his further submissions about travel entitlements or the Organisation's comments thereon.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas | Michel Gentot | Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re MALHOTRA (Ramesh Kumar) Judgment 1471

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ramesh Kumar Malhotra against the World Health Organization (WHO) on 24 June 1994, the WHO's reply of 14 September 1994, the complainant's rejoinder of 24 February 1995 and the Organization's sur-rejoinder of 29 May 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian citizen who was born on 1 November 1935, joined the WHO's staff in December 1967 as a secretary and shorthand typist at grade ND.5 in the Organization's Regional Office for South East Asia (SEARO) in New Delhi. He was later promoted to ND.6 and then to ND.7. He got a within-grade salary increase of one step for meritorious service under Staff Rule 555 in 1975 and another in 1979. The Organization granted him two further steps on completing 20 years' service, in January 1988, and two more, in January 1993, for 25 years' service.

In November 1991 the Administration put up for competition a post, No. 5.0013, for an assistant III at grade ND.8. The complainant was one of eight internal applicants. An ad hoc Selection Committee drew up a short list and submitted it to the Regional Director for final decision. On 25 March 1992 the Administration informed the complainant that he had not been successful.

He appealed against that decision on 22 May 1992. In a report of 1 May 1993 the regional Board of Appeal said that for want of information it had sought from the Administration about the proceedings in the Selection Committee it could make no recommendation on "the competitiveness of candidates". In an undated letter the Regional Director told the complainant he was upholding his earlier decision.

The complainant put his case to the headquarters Board of Appeal on 13 August 1993. In a report dated 15 February 1994 the headquarters Board recommended rejection. By a letter of 24 March 1994 the Director-General endorsed the Board's recommendation. That is the decision under challenge.

B. The complainant submits that the impugned decision shows personal prejudice against him: the reason why the Administration refused to make over documents to the boards of appeal was that it liked another candidate better. The Director-General overlooked such material facts as his own "excellent performance" and seniority. Alleging breach of provisions of the Staff Regulations and Rules on selection and promotion, he pleads procedural flaws and defects in the rating of candidates.

He asks the Tribunal to quash the appointment to post 5.0013, declare him appointed instead and award him 60,000 United States dollars in damages for "grave injury, moral prejudice, mental torture, and loss of reputation". He claims costs.

C. In its reply the WHO denies personal prejudice, neglect of material facts and breach of the rules. In the light of Judgment 1372 on a complaint by Mr. Kashmiri Lal Malhotra it offers to make the Selection Committee's records available to the regional Board of Appeal if the complainant agrees to a resumption of the proceedings before that Board. In any event the Regional Director picked the candidate he found "most suited" for the post.

D. In his rejoinder the complainant observes that the WHO has "admitted" the mistake it made by denying him due process in the internal proceedings. Its offer to send his case back to the regional Board is a "sinister" ploy to gain time. He presses his earlier pleas.

E. In its surrejoinder the WHO says there was nothing sinister about its offer: it just wants to settle the case quickly. It maintains that the appointment was lawful.

CONSIDERATIONS:

1. In 1967 the complainant joined the staff of the Organization's Regional Office for South East Asia (SEARO). In 1986 he reached grade ND.7. He was assigned to the Personnel Unit as an assistant. During his career he has been granted two salary increments, each corresponding to one step, for good service. In January 1988 he was awarded a two-step increment on completing 20 years' service and in January 1993 another such increment on completing 25 years. He was to retire in November 1995.

2. In November 1991 the WHO announced a vacant post for an "assistant III", No. 5.0013, and which was graded ND.8. The complainant applied but was declared unsuccessful. On 22 May 1992 he appealed against the decision to the regional Board of Appeal on the grounds of personal prejudice, incomplete consideration of the facts, and failure to comply with the Staff Regulations and Staff Rules and with the terms of his appointment.

3. The regional Board reported on 1 May 1993. It held, among other things, that in the absence of relevant information from the Administration it could make no specific recommendation "regarding the competitiveness of candidates". It suggested that the Regional Director "look into the relevant documentation ... not provided to the Board" before he rejected or allowed the appeal.

4. In a letter to the complainant the Regional Director said that he accepted the Board's conclusion that there was no factual evidence to support the plea of personal prejudice; that "the selection documentation", having "confidential status", could not be made available to the Board; but that, having himself gone through it, he was satisfied that the selection had been correctly made.

5. On 13 August 1993 the complainant lodged an appeal with the headquarters Board of Appeal. In its report dated 15 February 1994 the Board declared that it had found no evidence to support his plea of personal prejudice on the part of his supervisor or others involved in the selection. Having no further information on the process of selection but noting that the Regional Director had himself reviewed the candidates' files and declared the process to be fair, the Board could find no proof of incomplete consideration of the facts. Nor had it found evidence of failure to observe the rules or the terms of the complainant's appointment. It also said it "accepted the

Director-General's endorsement of a long-standing WHO policy that the records of the meetings of Selection Committees should not normally be available to the Board".

6. By a letter dated 24 March 1994 the Director-General informed the complainant that he accepted the headquarters Board's recommendation and accordingly rejected his appeal. That is the decision impugned.

7. In the brief filed on 14 September 1994 in reply to the complaint the defendant cites Judgment 1372 (in re Kashmiri Lal Malhotra), which was also about the WHO's rejection of a candidate for a post. The Tribunal held in that judgment that failure to disclose the Selection Committee's records resulted in the frustration of the internal appeal proceedings and denial of due process to the complainant. It accordingly sent the case back to the regional Board of Appeal and ordered the Organization to make the Selection Committee's full records available to that Board. The Organization says in its reply that it wishes to comply in this case with the Tribunal's earlier ruling on the disclosure of the Selection Committee's records.

8. The Organization appends to its reply the text of a letter it had written to the complainant on 2 September 1994 offering to return his case to the regional Board of Appeal. It asked the complainant to withdraw this complaint and said that if he did not it intended to apply to the Tribunal for a stay or adjournment of the proceedings. It confirmed that the full records of the process of selection would be made available to the regional Board and, if need be, to the headquarters Board too. In his rejoinder, however, the complainant says that he does not agree to withdraw his complaint. He says he never saw the letter of 2 September 1994 until he received the text of it with the Organization's reply. In his submission the Organization ignores his "suffering" and has not explained what redress it is offering him.

9. The Tribunal holds that the process of appeal has indeed been set at nought because neither Board of Appeal had at its disposal the information necessary for consideration of the case. The proper procedure is to return the case to the regional Board so that it may resume proceedings with the Selection Committee's full records at its disposal. If dissatisfied with the outcome, the complainant may make a further appeal to the headquarters Board of Appeal and the Director-General will eventually take a final decision. The decision impugned in this complaint must therefore be quashed.

10. The Organization having committed a breach of due process, the complainant is entitled to damages for the moral injury attributable to such breach and to the delay and inconvenience which he has suffered and will yet suffer before the case is disposed of. The amount is set at 3,000 United States dollars. He is also awarded a sum in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 24 March 1994 is quashed.
2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board may take up the complainant's case anew.
3. The Organization shall pay the complainant $3,000 in damages for moral injury.
4. It shall pay him $500 in costs.
5. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SCHUITEMAKER

Judgment 1472

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Peter Schuitemaker against the European Patent Organisation (EPO) on 28 March 1995 and corrected on 7 April, the EPO's reply of 23 June, the complainant's rejoinder of 25 July and the Organisation's surrejoinder of 25 August 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman born in 1955, joined the staff of the EPO on 1 November 1990 as a substantive examiner at grade A3 at the Organisation's headquarters in Munich.

Article 60(2) of the Service Regulations of the European Patent Office, the Organisation's secretariat, says:

> "... the home ... shall be the place with which [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.
>
> Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

On 9 June 1992 the complainant submitted a form asking the Administration to make Welton, in England, the place for his home leave. A personnel officer replied on 23 June that the Administration considered Baarn, in the Netherlands, to be his home.

In a letter dated 24 June he asked the personnel officer to review his application for home leave in England. In a note of 10 July 1992 the personnel officer upheld the earlier decision, explaining that Baarn was where the complainant had been born and brought up and where his parents still lived.

The complainant appealed on 2 September 1992. In a report dated 21 November 1994 the Appeals Committee recommended rejection.

By a letter of 10 January 1995, the impugned decision, the Director of Staff Policy told him that the President had endorsed the Committee's recommendation.

B. The complainant submits that the President erred in law and overlooked essential facts. England is the country with which he has the closest ties. He owns a home there, his wife is British, her family live there, and English is the language he and she speak at home. His only link with Baarn is his parents' residence there.

He wants the Tribunal to set the impugned decision aside, make Welton the place of his home leave as from 1 November 1990 and pay him the difference between the costs of travel on home leave to Baarn in 1992 and 1994 and what the costs would have been had he gone to Welton.

C. In its reply the EPO contends that the impugned decision was right. Not until April 1989 did the complainant go to Welton, and that was only to take up a job. Though he owns a home at Welton he lived there for only 19 months before going to Munich. The six-and-a-half years he has spent in England must be weighed against the 28 for which he lived in the Netherlands. Ties with his own family matter more than ties with his wife's.

D. In his rejoinder the complainant objects to the Organisation's account of the facts. More than six years before joining the EPO he made a conscious decision to settle in England. He says he was "made to understand" in an interview with the Administration that it was the place of his recruitment that would be the place of his home leave.

He presses his earlier claims and also seeks an award of 2,500 German marks in costs.

E. In its surrejoinder the EPO observes that there is nothing new in the rejoinder to make it change its pleas. The place of recruitment and the place of home leave are quite different. His allegation that an interviewer misled him is "unverifiable".

CONSIDERATIONS:

1. The complainant, who is a citizen of the Netherlands, was born at Bussum, in that country, on 29 September 1955. In 1958 his family moved to Baarn, which is also in the Netherlands, and his parents still live there. He attended school at Baarn from 1961 to 1974 and the University of Delft from 1974 to 1983. In 1981, while he was at the university, he married a citizen of the United Kingdom. He and his wife moved to Sheffield, in England, in April 1984. He bought a house there in June 1984 and worked there until March 1989. In April 1989 he moved to Welton, in Northamptonshire. At the end of 1989 he bought a house at Welton, having sold the one in Sheffield. He entered the Organisation's service on 1 November 1990 and is stationed at its headquarters in Munich.

2. On 12 May 1992 he applied to the Organisation for permission to take home leave at Welton. The EPO then found that the place of his home leave, as provided for in Article 60(2) of the Service Regulations set out in A above, had not yet been established.

3. On 9 June 1992 he asked that Welton should be the place where he might take home leave. His request having been refused on 23 June, he lodged an internal appeal on 2 September 1992. In its report of 21 November 1994 the Appeals Committee recommended rejecting his appeal. The President of the Office did so in a final decision that was conveyed to him in a letter dated 10 January 1995 and is the one impugned.

4. The complainant submits that his closest connections are with England, where his wife's family live; that the address from which he corresponded with the Organisation at the time of recruitment was at Welton and so Welton should be the place of his home leave as well; that he owns a house there; that he has a bank account, savings account, life assurance and private pension in England; that he has a permit for permanent residence in the United Kingdom; that he transfers a part of his salary to that country to repay the mortgage he took out on his house; that he has a will drawn up in England; and that on recruitment the EPO gave him to understand that the place of his residence at that time would be the place where he might

take home leave. He cites Judgment 525 (in re Hakin No. 5), whereby the Tribunal allowed an application for review of the place of home leave, and the case of a colleague whom the EPO authorised to take home leave at the place where she had a house.

5. The Organisation replies that the President has correctly applied the criteria for determining the place of the complainant's home leave. It points out that his parents live at Baarn and, contrary to what he implies, he is in regular touch with them. The Appeals Committee found that he had paid three visits to Baarn from England in five years and two in the four years since he had moved to Munich. The Organisation observes that he spent "at least 28 years" in the Netherlands as against some six-and-a-half years in England, including only 19 months at Welton.

6. The decision impugned is a discretionary one. The Tribunal will quash such a decision only if it was taken without authority or if it shows some procedural or formal defect or a mistake of fact or law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

7. In the case it ruled on in Judgment 525 the Tribunal held that the EPO had committed a mistake of law in that it had construed Article 60(2) of the Service Regulations as requiring that the place of home leave should be in the country of the employee's birth or nationality or in the country where the employee had been resident before taking up duty. Although "the home will generally be in the country of birth", that is "not an absolute and invariable rule". In that case the Tribunal also found that the Organisation had overlooked essential facts.

8. There is no question of any mistake of law in this case. The only material plea is whether the President overlooked some essential fact or drew clearly mistaken conclusions from the evidence. All relevant factors must be weighed to determine the place with which the complainant has the closest connection outside Germany, the country in which he is stationed. Yet, though the other factors he mentions are relevant, particular account must be taken of the three criteria in Article 60(2): the place of residence of his own family, the place where he was brought up and the place where he possesses property. Baarn is the place where his family still live and where he himself lived until the age of 19. He was then at university, still in the Netherlands, until the age of 28. His only connections with Welton are that he worked there for 19 months and bought a house there in December 1989.

9. The letter which the Director of Personnel wrote to the complainant on 4 July 1990, at the time of recruitment, merely said "your place of recruitment for the calculation of expenses etc., is considered to be Welton": it did not mention the place where he was to take home leave.

10. The making of payments by the Remuneration Department to service the mortgage on his house at Welton is not decisive: that department does not determine where the place of home leave is to be.

11. The case of the colleague whom he mentions is not similar. She is a citizen of the United Kingdom, besides having a house in that country.

12. In his application of 9 June 1992, in which he asked that Welton be "considered as the place for home leave", he entered against "Place where the employee was brought up" both Baarn and "Sheffield/Welton". That is an extraordinary claim for him to make inasmuch as he had got married, had completed nine years' university education and was aged 28 before he moved to England. His connection with Welton did not even begin until he went there in April 1989.

13. The conclusion is that the President has not overlooked any material fact or drawn any clearly mistaken conclusions. He was entitled on the facts to come to the conclusion which he reached and it is not for the Tribunal to substitute another assessment for his. Since the complainant cites no other grounds for quashing the decision it must stand.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re GUPTA

Judgment 1473

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Shiv Raj Gupta against the World Health Organization (WHO) on 9 December 1994 and corrected on 21 December 1994, the WHO's reply of 29 March 1995, the complainant's rejoinder of 28 April and the Organization's surrejoinder of 5 July 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. WHO Staff Rule 355 provides for payment to a staff member of the Organization of a special education grant for any "physically or mentally incapacitated" dependent child up to the end of the year in which the dependant reaches the age of 25. The grant covers the full amount of expenses the staff member incurs up to a specified maximum for the year.

The complainant, an Indian citizen, joined the staff of the WHO in July 1979 as a clerk/typist at grade ND.3 in the Organization's Regional Office for South East Asia (SEARO) in New Delhi. His present grade is ND.5.

In July 1979 he applied for the special education grant under Staff Rule 355 for his six-year-old daughter Neeta, who had residual paralysis of her right leg from poliomyelitis. In September 1981 the Organization agreed to pay him the grant with the rider that it would refund the costs of a private tutor and of conveyance by taxi "for up to twelve months, at the present time". It went on paying him the grant over the next few years.

On 20 March 1986 his daughter had an accident in which she suffered severe abdominal injuries and pelvic fractures. By a memorandum of 14 May 1986 to the Personnel Division of SEARO the complainant applied for a special education grant for his daughter for the school year 1984-85. He appended a letter dated 19 March 1983 from an orthopaedic surgeon stating that

his daughter was "unable to concentrate on her studies as much as she should" and that "the need for a special tutor is justifiable".

By a memorandum of 4 August 1986 a personnel officer informed him that to claim the refund of the cost of private tuition he should provide medical evidence that his daughter needed it "on account of" her disability. The complainant thereupon submitted written evidence. He learned from a memorandum the personnel officer sent him on 27 April 1987 on the Regional Director's behalf that the Joint Committee on Special Education Grants at WHO headquarters, in Geneva, had found "no justification" for further payment of the grant. The Committee recommended that he submit to the regional Insurance Surveillance Committee, in New Delhi, his claims arising out of his daughter's accident in March 1986.

The complainant asked for review of that decision by a memorandum of 14 July 1987 to an insurance officer but the personnel officer confirmed it on the Regional Director's behalf in a memorandum of 22 December 1987. In a letter of 30 May 1988 the staff physician of SEARO asked the complainant's daughter to undergo examination so that he might "review her case". There followed correspondence on the subject between the complainant and the Administration. On 2 July 1991 the staff physician declared her to be "handicapped by 1) poliomyelitis of right leg and 2) tilting of pelvic bones due to injuries by accident".

The upshot was a memorandum dated 26 July 1991 from the personnel officer telling the complainant that the Joint Medical Service at headquarters did not consider her to be a "disabled child" within the meaning of Staff Rule 310.5.2 and she therefore failed to qualify for the grant under Rule 355.

The complainant objected and again the regional staff physician examined his daughter. By a memorandum of 2 April 1993 the personnel officer informed him that the Medical Service felt unable to change its earlier "recommendation". The complainant having asked why, the Director of Personnel told the staff physician in a memorandum of 14 July 1993 that his daughter failed to qualify because she was not "mentally handicapped" and her difficulties in learning were "not attributable to her physical handicap".

On 5 October 1993 the complainant appealed against that decision. The regional Board of Appeal, which took up his case in January 1994, recommended rejecting it as time-barred. The Regional Director endorsed the Board's recommendation and the complainant got notice of his decision in a letter of 31 January 1994.

He then went to the headquarters Board of Appeal, which also recommended rejection in its report of 22 September 1994. By a letter of 18 October 1994, which the complainant impugns, the Director-General decided to endorse that recommendation.

B. The complainant submits that his complaint is receivable and the impugned decision unlawful. The WHO's calls for new evidence and the further medical examinations it ordered show that it was still reviewing his daughter's case and that he had to await a substantiated decision. The Organization shows bad faith in saying that it had already taken the appealable decision on 27 April 1987.

To stop the grant was arbitrary and in breach of Rule 355. His daughter suffers from permanent disability, and doctors and teachers blame it for her difficulty at school. What purpose is the grant to serve but to help disabled dependants to make the most of their abilities?

He seeks payment under Rule 355 to cover the costs of private tuition for his daughter and travel by taxi to and from school. He also claims 25,000 United States dollars in damages and an award of costs.

C. In its reply the WHO contends that the complaint is irreceivable. The memorandum of 27 April 1987 contains the final decision. He had sixty days in which to appeal and his challenge to it was over six years late.

On the merits the Organization submits that the decision complied with Rule 355.2. For want of medical evidence that his daughter's difficulty in learning arose from her disability, payment of the grant was not warranted.

D. In his rejoinder the complainant points out that the Administration never referred to its memorandum of 27 April 1987 as "final" until he put the matter to the regional Board. That is why he answered its requests for further medical evidence. The WHO's denial of his daughter's disability is at odds with the facts and with its earlier application of Rule 355.2.

E. In its surrejoinder the Organization presses its arguments in the reply. It has never denied the permanent disability of the complainant's daughter; but not every disability confers entitlement to the grant. In this case the conditions for payment are not met.

CONSIDERATIONS:

1. The complainant is employed in the General Service category of staff of the World Health Organization at its Regional Office for South East Asia in New Delhi. He is the father of a physically handicapped daughter, Miss Neeta Gupta, who was born in 1973. She suffers from residual paralysis due to poliomyelitis.

2. On 12 July and 12 November 1979 the complainant applied for a grant in respect of his daughter under WHO Staff Rule 355, which is headed "Special Education Grant for Disabled Children". Staff Rule 355.2 reads:

> "The special grant is payable when the Organization determines, on the basis of medical evidence and in accordance with review procedures established by the Director-General, that one of the following circumstances applies:
>
> 355.2.1 the child is unable by reason of physical or mental disability to attend a normal educational institution and therefore requires special teaching or training to prepare him for full integration into society;
>
> 355.2.2 the child, while attending a normal educational institution, requires special teaching or training to assist him in overcoming the disability."

3. On 4 September 1981 the Organization approved the reimbursement to the complainant of the cost of special shoes for his daughter and of her doctor's fees, and for up to twelve months her treatment by physiotherapy, coaching by a private tutor and fares for taxis to take her to and from the centre for physiotherapy. It later authorised up to the school year that ended in 1986 the payment to the complainant of medical fees, charges made for physiotherapy, equipment and the costs of private tuition.

4. On 20 March 1986 the complainant's daughter suffered serious injury in an accident which caused, among other things, fractures and tilting of her pelvis.

5. By a memorandum dated 27 April 1987 a personnel officer in the Regional Office told the complainant that the headquarters Joint Committee on Special Education Grants -

> "could find no justification for further payment of special education grant for Neeta Gupta, since it did not appear that in fact she required, or was receiving, any 'special' teaching or training designed to meet a specific physical or mental disability."

6. By a memorandum of 14 July 1987 to an insurance officer in the Regional Office the complainant applied for review of that decision. After referring to his daughter's handicap and the injuries she had suffered in the accident in 1986 he maintained that she was "not in a position to travel by bus" and had therefore "been going to school by taxis".

7. The Organization's position having nevertheless remained unchanged, correspondence ensued on the subject between the parties. In 1991 the regional staff physician referred the case to the Joint Medical Service at headquarters in Geneva. In a memorandum dated 26 July 1991 the personnel officer told the complainant that according to the Medical Service "Miss Neeta Gupta could not be recognised as disabled and, therefore, she is not eligible to be covered by the articles 310.5.2 and 355 of the Staff Rules". The complainant having objected, the regional staff physician had his daughter examined again by an orthopaedic surgeon in New Delhi. By a certificate dated 14 November 1992 the surgeon declared her to be suffering from 50 per cent permanent disability in the right leg and unable to walk long distances. The staff physician then made a new report to headquarters. The upshot was that by a memorandum of 14 July 1993 to SEARO, of which the complainant got a copy, the Director of Personnel stated the Organization's conclusion that his daughter's "scholastic difficulties are not attributable to her physical handicap ... Thus Neeta no longer qualifies for special education grant since those expenses are only for teaching or training services and/or related equipment".

8. On 5 October the complainant appealed against that decision to the regional Board of Appeal. In January 1994 the Board recommended rejection of the appeal and the Regional Director endorsed that recommendation in a letter of 31 January 1994. The complainant then put his case to the headquarters Board of Appeal. In its report of 22 September 1994 that Board too recommended rejecting the appeal, and the Director-General decided to follow that recommendation by a letter dated 18 October 1994. That is the decision the complainant is impugning.

9. The first material issue is whether or not the Organization's decision of 27 April 1987 was a "final" one within the meaning of Article VII(1) of the Tribunal's Statute. The complainant says not, on the grounds that throughout the exchange of correspondence between headquarters and the Regional Office the matter remained open. In his submission it was not until 14 July 1993 that the Organization at last decided that his daughter's scholastic difficulties were not attributable to her physical handicap and that he had a decision of "some substance" to appeal against. For its part the Organization contends that its final decision was in the personnel officer's memorandum of 27 April 1987.

10. In Judgment 1304 (in re Coe) the Tribunal ruled, under 5, that there had been an express decision to terminate the complainant's appointment and that the "further action he took or any proposals that may have been made to him" did not detract from the finality of the decision. Likewise in Judgment 1327 (in re Gillespie) the Tribunal held, under 7, that a decision remained final within the meaning of the defendant organisation's staff rules "even though later incidents and correspondence may have suggested that there was some possibility of a change" in that organisation's position.

11. Much of the pleadings in this case debates whether or not the complainant's daughter is disabled. But that is a separate issue. In support of his application under Rule 355 the complainant attached to his memorandum of 14 May 1986 to the Personnel Division of SEARO a letter dated 19 March 1983 from an orthopaedic surgeon saying that because of physical disability his daughter was "unable to concentrate on her studies as much as she should". The complainant appends to his rejoinder a certificate dated 4 July 1987 by a psychiatrist stating that his daughter "is in need of special coaching". But he did not append that certificate to his memorandum of 14 July 1987 seeking review of the Organization's decision of 27 April 1987. In that memorandum he merely sought reimbursement of the cost of taxis his daughter had taken to and from school, and he made no mention of her need for private tuition on account of physical disability. So the Organization concluded that his daughter's scholastic difficulties were "not attributable to her physical handicap" and that she no longer qualified for a special education grant.

12. The Organization's decision of 27 April 1987 was final in refusing payment of the special education grant. Though the Organization was willing to consider further medical reports and change its mind if the evidence so warranted, that decision was still a final one. In the event the complainant failed to produce admissible evidence and it took no new decision. Having failed to make his internal appeal against the decision of 27 April 1987 within the time limits set in the Staff Rules, he has not properly followed the internal procedure of appeal and his complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re LOJPUR

Judgment 1474

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by M. Milorad Lojpur against the United Nations Industrial Development Organization (UNIDO) on 21 June 1994 and corrected on 13 July, UNIDO's reply of 5 October 1994, the complainant's rejoinder of 16 March 1995 and the Organization's surrejoinder of 16 June 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the former Yugoslavia who was born in 1941, joined UNIDO in August 1991 on an appointment for three-and-a-half months as a consultant in Antananarivo, in Madagascar. His work proved satisfactory, and by a letter of 10 February 1992 the head of the Project Personnel Recruitment and Administration Service offered him a six-month appointment as from 1 December 1991. He was to be chief technical adviser at grade L.5, step V, to a project that UNIDO was carrying out with the United Nations Development Programme (UNDP). He accepted the offer on 11 April 1992.

Although his appointment ended on 31 May 1992 he apparently carried on working for UNIDO thereafter in the hope of getting an extension of contract for another UNDP project. Though he got no such extension, he carried out a mission for the Organization in June 1992.

In a form dated 17 July 1992 and headed "Internal Travel Authorisation", he applied to UNIDO for leave to carry out a mission by motor car in Madagascar from 20 to 22 July. Though leave was not granted he set off in a UNDP vehicle. He had an accident on 20 July.

By a letter of 18 January 1993 the UNDP's Resident Representative in Madagascar informed him that he was in the country "as a private person and at [his] own expense", and asked him to report on any work he had done after the expiry of his appointment and to have the damage to the vehicle repaired at his own expense. He was also to send back any papers and supplies still in his possession, and he did so at the end of January 1993.

In May 1993 he sent a work report to the Resident Representative, who forwarded it to the Organization's headquarters in Vienna. On 15 July the head of the Africa Unit of the Industrial Investment Programme Section at headquarters wrote a letter to the Representative. He sent a copy to the complainant. He said that the report mentioned no new projects and that UNIDO had concluded no further contract with the complainant after the expiry of his appointment in May 1992. But he suggested considering "the possibility of payment" under the project the complainant had been recruited for in February 1992 "if there was still money for the purpose".

In a memoradum of 30 August 1993 to the head of the Africa Unit the complainant objected in writing to the terms of that letter. By a letter of 3 November 1993 he asked the Deputy Director-General of UNIDO to "look into" the memorandum of 30 August. And on 25 February 1994 he applied to the Director-General for "a ruling on payment for services to UNIDO from June to November 1992". He got no reply.

B. The complainant submits that the reason why he continued to work for UNIDO after his contract had expired was that he had oral promises from the Director of UNIDO's office in Madagascar. The Director assured him in discussions in November 1992 that his "services from June to November 1992 [would] be made official".

He asks the Tribunal to order the Organization to pay him the salary at grade L.5, step V, to which he considers he is entitled for the period from 1 June to 30 November 1992, and his entitlements under appointments for at least one year, including contributions to the United Nations Joint Staff Pension Fund, plus interest; to award him 250,000 United States dollars in damages and $30,000 against "the irrecoverable costs of law enforcement"; and to grant him costs.

C. In its reply the Organization submits that the complaint is irreceivable. The complainant's appointment ended on 31 May 1992 and, despite several warnings in 1992 and 1993, he failed to meet the time-limit in the Staff Regulations and Staff Rules for appealing against the decision not to extend his appointment.

On the merits it submits that the complainant adduces no evidence of the work he says he did for the Organization from June until November 1992. Besides, the requirements were not met for extension of his appointment, particularly the grant of approval by the Government of Madagascar.

It denies that the Director of its office in that country asked him to stay on or promised any extension of appointment. In any event an oral promise does not constitute a contract.

D. In his rejoinder the complainant maintains that he did work for UNIDO in the period in question and he produces several items in support.

E. In its surrejoinder the Organization presses its pleas.

CONSIDERATIONS:

1. UNIDO appointed the complainant as a consultant at Antananarivo for three-and-a-half months from 16 August 1991. It then granted him a contract of appointment as chief technical adviser, still in Madagascar, for six months up to 31 May 1992. That contract, which he did not sign until 11 April 1992, said that if he had his appointment extended beyond the date of expiry without any break in service the extension would start at 1 June 1992. Although he never had his appointment officially extended he did, in circumstances that are not wholly clear from the evidence, continue after 31 May 1992 to regard himself and to be regarded by others as engaged in UNIDO business. He asked several times that his status be made official by the conclusion of a contract of service for the period from 1 June to 30 November 1992. In a letter of 25 February 1994 to the Director-General he claimed recognition of his rights and payment for his services in that period. He is asking the Tribunal to set aside the implied rejection of his claims.

2. The Organization pleads first that since its contractual relationship with the complainant ended on 31 May 1992, the date of expiry of his short-term appointment, he was not free thereafter to go to the Tribunal. It is thereby confusing issues of receivability and the merits. As an employee of the Organization the complainant is plainly entitled to claim the extension of his appointment. If the claim is unsound his complaint will fail, but the issue bears on the merits, not on receivability.

3. The Organization further pleads that his letter of 25 February 1994 to the Director-General was out of time because several decisions affecting him adversely were notified to him in 1992 and early in 1993 and, in line with the material provisions of Rule 212.02(a), he should have sent it within sixty days of receiving notice of the decision he was impugning. But the Tribunal is satisfied on reading those texts that he had no reason to treat any of them as final and that indeed they suggested that his status would be made official. So the Organization's objections to the receivability of the complaint fail.

4. In support of his claims the complainant alleges that he was given oral promises of extension and actually worked for UNIDO from 1 June to 30 November 1992.

5. As UNIDO contends, the evidence he cites may not be construed as promising extension. A "Unidogram" that the Project Personnel Recruitment and Administration Service sent him on 10 April 1992 did speak of extension beyond 31 May 1992, but the language it used was cautious and made no commitment on the Organization's part. Again, though the correspondence shows that some UNIDO officers did want to sort out a very obscure state of affairs, he adduces no real evidence of any intention on the part of the Organization of keeping him on. Nor is there evidence to suggest that any competent UNIDO officer promised him an extension. There was no contract, no commitment and no promise for the period at issue.

6. Yet the execution of the project he had been recruited for went on after 31 May 1992 and the evidence is that he did carry out a three-day mission in June 1992 for the purposes of the project. Although the mission came under a project that was supposed to be completed, it is plain from the local UNIDO officers' consent to the mission that they were still treating him as answerable to them. Indeed the whole case shows much delay in clearing up the complainant's situation and a striking carelessness in handling the case. So it seems only fair to acknowledge that the complainant had good reason to believe that in June 1992 he was still in the Organization's employ.

7. The conclusion is that UNIDO must pay him damages equivalent to the one month's pay he would have earned had his contract been extended until 30 June 1992, plus interest to be reckoned at the rate of 10 per cent a year up to the date of actual payment. His other claims are disallowed save that he is entitled to an award of 1,000 United States dollars in costs.

DECISION:

For the above reasons,

1. UNIDO shall pay the complainant damages to be reckoned as set out in 7 above.

2. It shall pay him 1,000 United States dollars in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. ichel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re BEL GHAZI

Judgment 1475

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Rajâ Bel Ghazi against the World Health Organization (WHO) on 13 December 1994 and corrected on 13 January 1995, the WHO's reply of 6 April, the complainant's rejoinder of 12 May and the Organization's surrejoinder of 15 August 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Morocco who was born in 1958, joined the WHO in July 1988 as a secretary in the office of the Organization's Representative in that country. In September 1989 a first probation report said that she must do better. The period of her probation was extended by three months. In December 1989, after a satisfactory second report, she had her appointment confirmed. Her fixed-term appointment was renewed several times, the last up to 30 September 1994.

Her next three yearly performance reports were satisfactory. In March 1990, however, she was given an oral reprimand because of her conduct and failure to get on with a colleague and, in January 1991, a written reprimand calling upon her to comply with the office's administrative rules.

On 27 November 1992 a dispute broke out between her and a colleague. In a fax of 16 December the personnel officer at the WHO's Regional Office at Alexandria sent her a written warning giving her three months in which to mend her ways. She replied in a memorandum of 22 December denying the charges against her. On 14 January 1993 the personnel officer told her that her performance would be assessed towards the end of March 1993.

In a memorandum of 29 January 1993 the WHO Representative said that her conduct was unsatisfactory. On 5 February she answered that the incidents he had described were "minor" and that she was resolved to work "to the best of [her] abilities".

In a report of May 1993 on her performance since July 1992 the Representative recommended dismissal on the grounds that her work was still below par. The complainant objected to both the contents of the report and the recommendation.

By a letter of 11 August 1993 the personnel officer told her that she was to be dismissed on 14 September 1993 and would get three months' pay in lieu of notice.

On 28 September she appealed to the regional Board of Appeal. In its report of 25 November the Board, while finding dismissal "rather harsh", recommended rejecting her appeal. The Regional Director wrote to her on 14 December 1993 endorsing the recommendation. On 20 January 1994 she appealed to the headquarters Board of Appeal. In its report of 26 August that Board too recommended rejection. By a letter of 7 October 1994 the Director-General confirmed her dismissal, and that is the decision she is impugning.

B. The complainant alleges that a fellow staff member was hostile towards her and that the WHO Representative decided to dismiss her to put an end to the "conflict of personality". In her submission so harsh a sanction was unwarranted.

She seeks payment of salary up to the expiry of her appointment at 30 September 1994 and damages for her dismissal, which she attributes to abolition of post.

C. In its reply the Organization maintains that its reasons for dismissing the complainant were her unsatisfactory performance and unsuitability for international service. Her failure to get on with others was disrupting the office.

It refutes her allegation of prejudice. She got many warnings and reprimands and was always given a chance to comment on them and improve.

Lastly, since her post was not abolished she has no claim to damages.

D. In her rejoinder the complainant contends that the impugned decision does not square with the WHO Representative's assessment of her services, and she produces an attestation from him praising her performance. She denies that she did not get on with colleagues and alleges that she was forced to draft or sign most of the documents the Organization has used in evidence against her. She makes a further claim: since the WHO denies abolition of her post she seeks reinstatement or, failing that, a certificate of good service.

E. To its surrejoinder the Organization appends a letter from its Representative challenging the genuineness of the attestation produced by the complainant. It submits that she was never forced to sign any document and repeats that her performance was poor.

CONSIDERATIONS:

1. The WHO appointed the complainant on 1 July 1988 as a secretary at local grade 5 in the General Service category of staff in the office of its Representative at Rabat. She held a probationary appointment. The first probation report called on her to improve in several respects and the period of probation was extended, by three months, to December 1989. Her next probation report spoke of improvement and the WHO confirmed her appointment.

2. Each of the three reports appraising her performance in the twelve months that ended at 30 June in 1990, 1991 and 1992 was on the whole satisfactory. Nevertheless in March 1990 she was given an oral reprimand after a quarrel with another staff member. In January 1991 she was given written instructions to follow office procedure properly and to forward all correspondence through the administrative assistant. On 27 November 1992 she had words with the assistant. The Representative discussed her future with her on 30 November. In December 1992 her brother, acting on information she had supplied, spoke to the Secretary General of the Moroccan Ministry of Health, who then telephoned the Representative to ask about her employment situation. On 14 December the Representative called the complainant in again and she acknowledged to him that the purpose of the message that her brother had sent through the Secretary General had been to protect her rights. She countersigned the same day a letter he had sent her recording what she had said at their meeting.

3. Two days later the personnel officer sent her a minute by fax from the WHO's Regional Office at Alexandria. The minute said that her supervisor, the Representative at Rabat, had reported her failure "to establish satisfactory working relationships with other staff members" and his own "dissatisfaction with [her] attitude and behaviour". The minute referred to conduct on her part which had led a "senior government official" to "query the internal matters of the Organization". It described her conduct as "contrary to the standard expected of an international civil servant" and gave her three months in which to show "substantial improvements" in her working relations and in acceptance of guidance and daily supervision. Her conduct would be reassessed by the end of March 1993. The minute constituted written warning under Staff

Rule 1070.2 that, failing such substantial improvements, "further disciplinary action" against her would be recommended, "including possibly that envisaged by S.R.1070.1". It is Rule 1070.1 that allows termination of appointment for "unsatisfactory performance or unsuitability for international service".

4. By a memorandum of 22 December 1992 the complainant answered the personnel officer's written warning. She denied the allegations against her. She said that the Representative, who had drafted the record of their meeting of 14 December, had been "adamant" that she should sign. She accused him of giving her an ultimatum on 27 November, after the dispute with the administrative assistant, that she should resign by 31 December or face dismissal. Though she had talked to her brother, she had not even been aware of his conversation with the senior government official until the Representative had told her of it.

5. In a memorandum to her of 14 January 1993 the personnel officer acknowledged receipt of her reply but reaffirmed the need for her to improve and sent a copy to the Representative for comment.

6. The Representative sent her a memorandum on 29 January 1993. He said that when he had seen her in November she had acknowledged that she could not work under the administrative assistant and had insisted she should come under his own direct supervision; if she did not she would have to leave. He had then observed that no member of the General Service category staff but the administrative assistant came under his direct supervision. He denied giving her any ultimatum. Her attitude and behaviour on 27 November 1992 and on other occasions had fallen short of the standards expected of an international civil servant. Despite the personnel officer's written warning of 16 December her reply of 22 December had described events "untruthfully" and given a "bad image" of her supervisor. Moreover, she had not sent him a copy, although the text said that she had. He summed up her behaviour as showing unsatisfactory performance and unsuitability for international service within the meaning of Rule 1070.1 and as constituting misconduct within the meaning of Rule 1075. As her supervisor he was duly giving her notice of the charges and said that unless he received satisfactory written comments from her within eight days she would be subject to further disciplinary action. The complainant's reply of 5 February 1993 dismissed what she called the "unhappy events" he had recounted as "minor office incidents".

7. On 3 May 1993 the Representative gave her a bad report on her performance in 1992-93. His conclusion was that she was "not fit to continue" as a member of the Organization's staff and he recommended "termination of employment". The

complainant added her written objections on 6 May 1993. On 19 June the Director of the Support Programme at the Regional Office noted in comments of his own her "resurgent difficulty" in establishing "fully satisfactory working relationships with other staff, including her supervisor(s)". He observed that her difficulty was now so great as to be "disruptive of the proper functioning" of the Rabat office. He agreed with the proposal for termination, which he said should come "as soon as the rules permit".

8. On 27 July 1993 the personnel officer telephoned the complainant to tell her that the Organization believed that it had sufficient grounds to terminate her employment but for compassionate reasons would let her resign. She answered that she wanted to stay on until the end of her contract, on 30 September 1994, but she was told that that was not an option. On 29 July she went to the Ministry of Foreign Affairs to discuss her position with the director of the section of international organisations in the Ministry and with the director of protocol. The Representative was actually summoned to the office of the director of international organisations.

9. The upshot was that on 11 August 1993 the personnel officer sent her a letter informing her that the Regional Director was terminating her appointment under Staff Rule 1070.3 as from 14 September. The reasons the letter states were:

(1) that she had failed to maintain satisfactory working relations with other staff, including her supervisor, and such failure showed her to be unsuitable for international service;

(2) that despite the written warning of 16 December 1992 she had "exhibited unsuitable behaviour and work performance problems" which had caused her supervisor to "lose confidence" in her ability to perform her duties; and

(3) that her conduct, as outlined in the minute of 16 December, had been unsuitable in that it had resulted in a query by a senior government official into internal matters and had been contrary to the standards expected of an international civil servant.

10. She appealed on 28 September 1993 to the regional Board of Appeal. In its report of 25 November the Board held that the decision fell within the Organization's prerogative, though in the Board's view it was a harsh one and her supervisors should have tried harder to build on the three satisfactory appraisals so as "to ensure the smooth running of the office". The Regional Director having on 14 December 1993 confirmed her dismissal, she went to the headquarters Board

of Appeal on 20 January 1994. In its report of 26 August the headquarters Board too held that the decision was lawful, though harsh, but recommended giving her a certificate of service that would not jeopardise her chances of finding employment elsewhere. The Director-General accepted the Board's recommendation, rejected her appeal and so informed her by a letter of 7 October 1994, the decision now impugned.

11. The complainant alleges that the WHO Representative was determined to get rid of her in order not to have to resolve a conflict of personality within his office, and he therefore built up a case to victimise her. The administrative assistant found it hard, she says, to deal with her because she had acquired skills from earlier service with other international organisations. As the regional Board of Appeal observed, she did get three good appraisals and her supervisors ought therefore to have done more to ensure the smooth running of the office. In her submission there were no proper grounds for the termination and in fact her post was abolished. Her claims are as set out in B above.

12. The Organization replies that her appointment was terminated in accordance with the Staff Rules. It observes that on 16 December 1992 it gave her the formal written warning, which referred to the risk of termination under Rule 1070.1, and it allowed her the time to improve which Rule 1070.2 required. She was entitled to three months' notice under Rule 1070.3 and was granted three months' pay in lieu. The office at Rabat being a small one, the administrative assistant was left in charge of day-to-day administration in the Representative's absence, and it was essential that the General Service staff should then get on with each other properly. Yet the complainant constantly failed to establish and maintain satisfactory working relations with other staff in her five years with the Organization.

13. The decision to terminate the complainant's appointment was a discretionary one, and consistent precedent has it that the Tribunal will not set aside a decision of that kind unless it shows a mistake of fact or law or a formal or procedural flaw, or some essential fact was overlooked or a clearly mistaken conclusion drawn from the evidence, or if there was abuse or lack of authority.

14. The regional Board's comment that her supervisors should have done more to ensure the smooth running of the office did not amount to acknowledgement that the Organization's charges against her were unfounded. The regional Board, and for that matter the headquarters Board as well, both acknowledged that the Organization had acted lawfully in dismissing her. What is more, the headquarters Board did not come to the same conclusion as the regional Board about her

supervisors' attitude. True, it described the consequences for her as harsh on the grounds that there was no opportunity of deploying her within the office. But that was a comment on a matter of fact: the Board still recognised that the Organization had been right to dismiss her. As for her allegation of victimisation and personal prejudice the headquarters Board actually said it could find no evidence in support. Nor can the Tribunal.

15. The complainant's contention that her post was abolished is also without foundation. She does not challenge, and the Tribunal sees no reason to question, the personnel officer's statement confirming that the duties of the post have continued unchanged and are now being performed by a staff member under a fixed-term appointment for two years.

16. The Organization lawfully dismissed the complainant under Rule 1070.1: it gave her due written warning; it let her have reasonable time in which to improve; it paid her three months' salary in lieu of notice; and it was unable to reassign her locally.

17. Even supposing that, as she makes out, she did not know that her brother was to visit the Secretary General of the Ministry of Health in December 1992, her visit in July 1993 to the director of international organisations at the Ministry of Foreign Affairs was all the more reprehensible in the light of the reprimand she had had on the earlier occasion. It is inadmissible that a staff member should involve government officials in questioning the Organization's internal workings.

18. The complainant's failure to establish satisfactory working relations with superiors is well documented. Not only did she fail to get on with the administrative assistant but the Representative too found her wanting; indeed he described as untruthful her account of their meeting in November 1993.

19. The conclusion is that the impugned decision shows none of the fatal flaws set out in 13 above, and that the complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re LOUIS (No. 5) Judgment 1476

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Frantz Marceau Louis against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 February 1995 and corrected on 2 May, UNESCO's reply of 27 June, the complainant's rejoinder of 18 August and the Organization's surrejoinder of 17 October 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career and some facts to do with this dispute are recounted in Judgment 1131 of 3 July 1991 under A. In that judgment the Tribunal quashed on the grounds of procedural flaws UNESCO's decision not to renew the complainant's appointment and awarded him one year's full pay in material damages. He made an application for interpretation of "full pay", and in Judgment 1173 of 15 July 1992 the Tribunal ordered the Organization to pay him interest on some of the amounts awarded in Judgment 1131. In a third complaint he sought, among other things, payment of certain amounts in redress for separation from the Organization. The Tribunal dismissed that complaint in Judgment 1263 of 14 July 1993. Judgment 1353 of 13 July 1994 dismissed his application for review of Judgment 1263.

By a letter of 25 October 1994 the complainant sent a protest to the Director-General seeking explanations of: (1) the failure to give effect to his decision of 16 August 1988, whereby the conditions and criteria applying to the bonuses and indemnities to be paid following the separations then being examined were to be the ones set out in the Staff

Regulations and Rules and in administrative circular 1474(II) of 22 November 1985; (2) the failure to publish and to observe in 1988 the stipulations of that circular; (3) the failure since 1988 to pay the three months' salary in lieu of notice due under the Staff Regulations; and (4) the failure to pay the complainant's outstanding entitlements in the amount of 379.70 United States dollars for medical and telephone bills.

By a letter of 21 November 1994 the Director of the Bureau of Personnel replied that the matter of non-renewal was "closed", having been ruled on by the Tribunal in four judgments. And since he had secured for himself an advance of $200 it would pay him the balance of $179.70. That is the decision he is impugning.

B. The complainant asserts that his complaint is receivable because the decision of 16 August 1988 was never notified to him. Furthermore, it is about matters that arose before he left UNESCO.

The rejection of his protest of 25 October 1994 was in breach of the terms of his appointment, of circular 1474(II) and of circular 1483(II) of 13 January 1986. The Director-General promised to put staff terminated in 1988 on a par with those who had gone in 1986, and the failure to keep the promise was in breach of equal treatment.

The decision of 16 August 1988 expressly acknowledged his right to coverage by circular 1474(II); it was an abuse of authority not to tell him what the circular said; and it was a breach of his acquired rights not to grant him the benefits it conferred on him.

He asks the Tribunal (1) to quash the decision of 21 November 1994 by the Director of the Bureau of Personnel; (2) to order UNESCO to produce a memorandum stating its policy from 1986 to 1988 on termination under Regulation 9.1.2 and Rule 109.7 and explaining how it applied circulars 1474(II) and 1483(II); (3) to consider some of his "acquired rights" under the circulars and in particular restore his entitlements: (a) to payment of a deferred pension from the United Nations Joint Staff Pension Fund or, failing that, payment by UNESCO of the wherewithal to buy a life annuity worth what the pension would have been, or else of the equivalent of three years' full remuneration, plus interest; (b) to payment of an amount equivalent to three months' remuneration in lieu of notice; (c) to the complainant's and his family's participation in the Medical Benefits Fund of UNESCO; (d) to continued membership of the UNESCO Savings and Loan Service and maintenance of his account with that Service; (e) to an increase in the capital

value of his life insurance or, failing that, to payment of two years' remuneration in damages for the loss of his right to such increase, plus interest; and (4) to order UNESCO to pay him $75,000 in damages for its "arbitrary, capricious, discriminatory and biased" attitude and failure to inform him in time of his entitlements under circulars 1474(II) and 1483(II). He seeks $5,000 in costs.

C. In its reply UNESCO submits that the complaint as a whole is irreceivable because the complainant failed to appeal against the decision of 21 November 1994 by the Director of the Bureau of Personnel and so to exhaust the internal means of redress. Taking up his main claims in turn, the Organization says that his claims to participation in the Medical Benefits Fund, to an increase in life insurance and to payment of $379.70 are also irreceivable for failure to exhaust internal remedies. And all his other claims are irreceivable under the res judicata rule in that what he is indirectly seeking is review of Judgments 1131, 1263 and 1353.

UNESCO observes on the merits that the text relevant to the reduction of staff in 1988 was circular 1583 of 23 February 1988; so circular 1474(II), which the complainant cites, is immaterial. It gave him four months' notice, and that was reasonable. As for his claim to $379.70, it cites its letter of 21 November 1994, which told him that the balance due was $179.70 because he had taken an advance of $200.

D. In his rejoinder the complainant presses his pleas and claims. Citing the case law, he argues that for res judicata to apply the parties, the claims and the cause of action must remain the same, whereas here only the first condition is met. He denies getting four months' notice.

E. UNESCO reaffirms in its surrejoinder that his main claims are irreceivable either under the res judicata rule or for failure to exhaust the internal means of redress. It maintains that the complaint is devoid of merit.

CONSIDERATIONS:

1. This is the fifth complaint by Mr. Louis against UNESCO. Ruling on his first in Judgment 1131 of 3 July 1991, the Tribunal allowed his claim to damages for wrongful dismissal. Having made an application for interpretation, he was awarded in Judgment 1173 of 15 July 1992 the payment of interest on some of the monies that UNESCO had wrongfully

withheld. In Judgment 1263 of 14 July 1993 the Tribunal dismissed his third complaint, in which he claimed pay in lieu of the notice he believed he had been entitled to; the quashing of his dismissal; the disclosure of a memorandum about UNESCO's policy on termination; and damages under various heads. Lastly, the Tribunal dismissed in Judgment 1353 of 13 July 1994 an application he had made for the review of Judgment 1263.

2. On 25 October 1994 he put a new appeal to the Director-General objecting to mistakes and to unlawful acts he imputed to the Organization. In his reply of 21 November 1994 the Director of the Bureau of Personnel merely said that "the matter of non-renewal is closed, having been disposed of in four complaints to the Tribunal" and that a sum of $179.70 "still at issue" would be paid to him forthwith. Being dissatisfied with that decision, which he finds cavalier and unacceptable, he has lodged this complaint asking the Tribunal to quash it and grant him many forms of relief that may be summed up as follows. He seeks the disclosure of a memorandum about dismissals at UNESCO. On the strength of various provisions he cites he claims the continuance of his employment, the grant of a pension, and the employment benefits he had enjoyed. He believes UNESCO's unlawful treatment of him warrants the award of damages on several counts, including payment of three months' remuneration in lieu of notice.

3. Most of his claims fail under the res judicata rule: his claim to disclosure of a UNESCO memorandum, which the Tribunal expressly disallowed in Judgment 1263; his claims to a pension, which are the same as claims that were dismissed in Judgments 1131 and 1263; his claim to three months' pay in lieu of notice, which in Judgment 1263 the Tribunal held to be irreceivable on account of his failure to exhaust his internal remedies and which is still irreceivable; and his claim, which has already been disallowed by Judgment 1263 as well, to an award of damages for what he sees as UNESCO's unlawful failure to alert him to his possible entitlements.

4. Other claims of his are admittedly new and res judicata is no obstacle: his claims to reinstatement in the Medical Benefits Fund, to membership of the UNESCO Savings and Loan Service and to the award of compensation for loss of an increase in his coverage under optional life insurance. But he has failed to put those claims to the internal Appeals Board and so, as the Organization asks, the Tribunal will reject them because of his failure to exhaust the internal means of redress.

5. Lastly, though he alleges that UNESCO owes him $379.70, he acknowledges that he got the $179.70 it promised in its letter of 21 November 1994. And though he says it still

owes him $200, he offers no evidence to cast doubt on its contention that he got that amount in the form of an advance. He merely says in his rejoinder that he will let UNESCO have evidence of its debt: the burden is on him to prove the debt, and he has not discharged it.

6. In sum the Tribunal will not entertain his many claims to the quashing of decisions, to the issuance of orders and to the award of damages because in making them he seeks directly or indirectly to question the non-renewal of his appointment. The Tribunal gave its final ruling on that issue in Judgment 1131. So his complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re NACER-CHERIF

Judgment 1477

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ahmed Nacer-Cherif against the International Training Centre of the International Labour Organization (ILO) on 7 February 1995, the Centre's reply of 12 April, the complainant's rejoinder of 13 June and the Centre's surrejoinder of 17 August 1995;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Algerian who was born in 1945, joined the International Training Centre of the ILO, which is in Turin, as head of its accounting unit at grade P.2 on 1 July 1975. He was transferred from the ILO's office at Algiers, where he had been serving as an administrative and financial assistant at grade G.7 since 1970. The Centre promoted him to P.3 in March 1981 as head of Management Control and appointed him on 1 February 1982 head of Planning and Administration. Since 1988 he has been chief of the Budget and Control Section at grade P.4. In 1992 the Centre created a Finance and Budget Service combining Budget and Control with Finance.

On 22 March 1994 the Centre issued a notice of vacancy, No. 5/1994, inviting internal and external applications for the P.5 post of chief of the Finance and Budget Service. The notice said that the Centre would give preference to applicants already on its staff. The complainant, two other staff members and 134 external candidates applied.

On 24 March the Selection Committee sent the Director of the Centre, at his instructions, proposals for membership of an ad hoc panel to make a preliminary assessment of the candidates.

On 8 June 1994 the panel called the complainant for interview. By a minute of 19 September the Director informed him that one of the external candidates had won. In a minute of 7 October he asked the Director to say why he had been passed over in favour of an external candidate. He saw the Director on 24 October. The Director explained that the Committee had ranked him fifth of six candidates on its short list and that, unlike the successful candidate, he did not, as the notice had required, have an advanced university degree in economics or business administration or an equivalent professional qualification. The Director confirmed those statements in a minute he wrote to the complainant the same day.

In a minute of 21 November 1994 the complainant lodged a "complaint" with the Director under Article 12.2 of the Centre's Staff Regulations. He expressed "doubts about the objectivity of the criteria which led to [his] being put in fifth place" and submitted that since the Selection Committee had not examined his candidature its treatment of him had been "unfair". The Director replied in a minute of 18 January 1995. He said that the Committee, which he had asked for an explanation, had answered that the complainant had not been discriminated against; the Committee had declared that it had been aware that it must come to its own conclusions, independently of the panel, and its members had had complete files on all the candidates. Concluding that the process of selection had been quite "rigorous and exhaustive", the Director rejected his "complaint". That is the decision he is impugning.

B. The complainant pleads breach of paragraphs 3, 4 and 10(b) of Annex H to the Staff Regulations ("Rules for filling of vacancies"), which say that professional experience may do instead of a university degree. The Director did assure the complainant in his minute of 18 January 1995 that lack of an appropriate university degree had not been the main reason for rejecting him; but he made out at the same time that the outside candidate's background was better than the complainant's own and he gave not the slightest explanation of the criteria by which he had reached that conclusion.

Nor did the Director heed what the notice of vacancy had said and what Article 1.2(d)(2) of the Regulations prescribed and give preference to internal candidates.

The Staff Regulations and the Selection Committee's standing orders say nothing of ad hoc panels. So there was breach of Article 0.8 of the Regulations, which forbids making an exception to the rules without the consent of the official concerned.

The complainant questions the impartiality of a member of the panel who, he says, threatened him after he had taken a decision as chief of the Budget and Control Section. He objects to the panel's putting him in fifth place when one of the first four was a grade P.2 official.

He contends that though the Selection Committee was the only body competent to assess the candidates it merely endorsed the panel's conclusions. Only two of its four members saw his application, even though all four had access to the applicants' files.

He seeks the quashing of the decisions to reject his application for the advertised post and to appoint an outside candidate. He claims awards of one United States dollar in token damages for moral and professional injury and of $1,300 in costs.

C. In its reply the Centre contends that the process of selection was proper.

It observes that the "complaint" the complainant filed on 21 November 1994 said nothing of the "threat" he now imputes to a member of the panel; so the "altercation" was not as bad as he makes out.

Neither in the course of the selection process nor in his "complaint" did he express reservations about the convening of the panel. It was warranted because the chairman was the only member of the Selection Committee who did not hold a lower grade than that of the post, and none of its members had any special knowledge of financial and budgetary matters. The panel's work was confined to preliminary assessment of the candidates' technical qualifications. Its conclusions were plain enough for some of the members of the Committee to see no point in looking at the candidates' files again.

It was not lack of a suitable university degree that prompted rejection of the complainant, though it was relevant in determining his ranking on the short list. The panel took the view that despite "long experience in the Centre" none of the three internal candidates "had the appropriate academic background". The successful candidate's professional qualifications set him above the others in training and experience. Only when applicants are equally qualified do internal candidates enjoy preference. As Article 1.2(a) of the Staff Regulations says: "The paramount consideration in the filling of any vacancy shall be the necessity to obtain a staff of the highest standards of competence, efficiency and integrity".

In any event - says the Centre - the complainant should have been rejected at the start because he had neither the right university degree nor equivalent professional experience.

D. In his rejoinder the complainant argues that though there might have been at least some grounds for having the panel do a preliminary sorting out of candidates it should have looked only at the external ones. Only the Selection Committee may assess internal applicants.

The reason why he did not object in the internal appeal to convening the panel was that he did not yet know that no other body had assessed him and given him a ranking. The Centre's explanation of its reasons for having the panel does not hold water since its members were ignorant of the technical field of the post.

Though he did not mention in his internal appeal the threats from a member of the panel - and there was no mere "altercation" - that was so as not to spread it abroad too much.

He puts his costs at $2,000.

E. In its surrejoinder the Centre points out that setting up the panel served in achieving the purpose, stated in Article 1.2(a) of the Regulations, of securing staff of the highest standards of competence, efficiency and integrity. The complainant is not saying that the panel's assessment caused him any injury whatever.

The Centre observes that he does not object in his rejoinder to its argument in its reply that the successful candidate was better qualified.

CONSIDERATIONS:

1. The complainant joined the ILO's office at Algiers in 1970 as an administrative and financial assistant. The Organization transferred him in 1975 to its International Training Centre at Turin. He worked there first at grade P.2, from March 1981 at P.3 and from 1 November 1988 at P.4. By 1992 he had his present job as chief of the Budget and Control Section. The Centre having decided to create a Finance and Budget Service, he applied in 1992 for the P.5 post of chief, which the Centre had put up for competition. After two attempts that eventually petered out the competition at last took place

in March 1994, and it was open both to serving staff and to others. It drew 134 outside candidates and three internal ones including the complainant. On the strength of a report by an ad hoc panel the Selection Committee concluded that the three outside candidates that the panel picked were the best. On 19 September 1994 the Director of the Centre told the complainant that he had not been successful and that an outside candidate, Mr. Peter Jones, had been offered the appointment. He lodged an internal "complaint" seeking review, or, failing that, promotion to P.5. But the Director refused his claims on 18 January 1995, and that is the decision he is impugning.

2. There is no doubt but that the complainant has a cause of action. He pleads many flaws in the process of selection: that a university degree was taken to be a sine qua non for the post; the Selection Committee surrendered to the panel responsibility for making a short list, the setting up of the panel was improper, and one of its members was hostile to him; his interview with the panel lasted only a dozen minutes; the Committee did not even look at his file; and the Director gave the staff false hope of promotion by issuing the notice and holding the competition when all along he meant to pick an outsider.

3. Some of those pleas must fail. For one thing, the Tribunal is satisfied on the evidence that, though the wording of the notice is not very clear, those who made the selection did not treat a university degree of the right sort as essential. For another thing, the complainant adduces not a jot of proof of his contention that the Director was bent from the outset on bringing in someone from outside.

4. Much more cogent are his pleas about breach of due process. Taken together, Article 1.2 of the Staff Regulations and Annex H, to which 1.2 refers, mean that when the Centre holds a competition to fill a post the Selection Committee provided for in Article 10.4 must examine the candidates by a process that is spelt out in great detail. In this case the Committee set up an ad hoc body to make a preliminary assessment, and according to the documents it was called an "examining" or "selection" panel. The Director appointed its six members on the Committee's own recommendation, and they included the chairman and one other member of the Committee. So it was distinct from the Committee itself which had four members: one appointed by the Director from the Personnel Office, one named by the Staff Union Committee, and the other two by the Director on the joint recommendation of Personnel Office and Staff Union Committee.

5. The evidence is that it was the panel that followed the various stages of selection prescribed in paragraph 10 of Annex H for internal competitions and in paragraph 12 for

external competitions. First, it looked at the records of the 134 external candidates and reduced the number to 29. Then it picked the best three, again on the strength of their written records, and decided to interview them, together with the three internal candidates, who were not covered by the preliminary assessment. After an interview with each of them - the one with the complainant lasted but 12 minutes - it ranked the six remaining candidates, putting the three external ones first and the complainant fifth. The panel reported to the Selection Committee on 23 June 1994 and the next day the Committee unanimously accepted its conclusion that the three external candidates were "the best" and "fully qualified for carrying out the job in question".

6. The Committee reached that conclusion without having seen any of the candidates or looked at the application forms and personal records of the internal ones. It was from two members of the Committee that the complainant learned that the Committee as such had never seen the records, and though the leak may have been a pity he is free to rely on the information. He at once told the Director, and in a minute of 18 January 1995 the Director answered that he had sought an explanation from the Committee on that score but found nothing wrong. He had been told - said the Director - that "the Committee had fully realised it must make up its own mind independently of the panel", that the application forms and personal records had been "at the disposal of the members" of the Committee, and that they had all carefully studied the panel's report.

7. It is plain from the whole process of selection that though the Committee did endorse the panel's report it had neither looked at the individual applications nor seen any of the candidates but had left all that to the panel. Though it is not unthinkable for a selection committee to set up a panel of people whom it believes to be better fitted to assess the technical qualifications of candidates, especially external ones, it may not delegate altogether its authority under the Staff Regulations. It must exercise its own authority and not delegate unless the rules say it may.

8. That is even more important where, as in this case, the membership of the body that purports to delegate affords the staff special safeguards. Since the panel's members came mostly from the management side it was no offshoot of the Selection Committee, even though the Director had consulted the Committee about its membership and, as was said in 4 above, two of its six members were on the Committee too.

9. By letting the panel draw up a short list and endorsing its conclusions without even seeing the candidates on that list or looking at their records the Committee failed to

observe its terms of reference under the Staff Regulations. Since the process of selection was therefore unlawful there is no need to entertain the complainant's plea that someone who was both on the panel and on the Committee had made remarks betraying dislike towards him.

10. What redress, then, is to be granted for the flaws in the process? As the Tribunal held in Judgment 1359 (in re Cassaignau No. 4), an organisation must be careful to abide by the rules on selection and appointment. When the process proves flawed the Tribunal will quash any decisions it engendered and order resumption with due heed to the rules, albeit on the understanding that the organisation must shield the successful candidate from any injury that else may flow from the quashing of an appointment accepted in good faith. Here the Tribunal will follow that precedent. In a subsidiary plea the defendant suggests an award of damages, instead of rescission, by way of redress. The Tribunal holds such award to be inadvisable in the circumstances.

11. The conclusion is that the decisions to reject the complainant and to appoint Mr. Peter Jones as chief of the Finance and Budget Service must be set aside. But the Centre shall see to it that Mr. Jones sustains no injury on that account.

12. As to the complainant's claim to token damages for moral injury this judgment affords a remedy for any such injury.

13. Since he succeeds he is entitled to costs in the amount he claims.

DECISION:

For the above reasons,

1. The decisions by the International Training Centre of the ILO rejecting the complainant and appointing Mr. Peter Jones as chief of the Finance and Budget Service are set aside.

2. The case is sent back to the Centre.

3. The Centre shall pay the complainant 2,000 United States dollars in costs.

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re GILL

Judgment 1478

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Nirmal Gill against the International Atomic Energy Agency (IAEA) on 2 March 1994 and corrected on 14 February 1995, the Agency's reply of 31 May, the complainant's rejoinder of 12 July and the IAEA's surrejoinder of 18 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Rule 4.06.6(B) of the IAEA's Provisional Staff Rules prescribes payment of an end-of-service allowance to an official with sufficient seniority who resigns, as provided in 4.06.6(A)(5) and (6), "after childbirth" or in order to "join another United Nations common system organization without break of service".

The complainant, a citizen of India who became an Austrian in May 1994, joined the Agency's staff at headquarters in Vienna in August 1983 under a six-month appointment as a clerk/typist at grade G.5. She got four extensions of contract, the last until 31 January 1995.

In a memorandum dated 13 June 1991 to the Director of the Division of Personnel she tendered her resignation. The acting Director of the Division accepted it in a letter of 17 June and she stopped work at the Agency on 21 June, though her resignation did not take effect until 18 July 1991. She was not paid the end-of-service allowance.

By a letter of 29 November 1993 she asked the Director General of the Agency to review the decision not to pay her the allowance on the grounds that the Staff Rules "appear to contradict each other". Replying on the Director General's behalf, the Director of Personnel confirmed in a letter dated 2 December 1993 that she did not qualify for payment of the allowance.

In a letter dated 6 December 1993 to the Director General she objected to the reply and asked for leave to put her case directly to the Tribunal. The acting Deputy Director General informed her in a letter of 29 December 1993 that although her appeal was time-barred the Director General had agreed to waive her obligation to go to the Joint Appeals Board. She is impugning the letter of 2 December 1993.

B. The complainant submits that the Director General relied on an "unlawful" rule to deny her the end-of-service allowance. The reasons why she resigned have no bearing on her entitlement and there was nothing in the terms of her appointment to suggest that they might. But in 1987 the Agency changed the rules to link payment of the allowance to the reasons for resignation. That the Administration failed to explain the new rules shows how arbitrarily it had acted.

She seeks the quashing of the decision and payment of the allowance plus interest at the rate of 14 per cent a year from the date at which it fell due. She claims awards of 100,000 United States dollars in damages "for all forms of injury" and of 7,000 French francs in costs.

C. In its reply the IAEA contends that the complaint is irreceivable because her internal appeal was time-barred and she has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires. Having got notice by 17 June 1991 of the decision not to pay her the allowance, she had two months in which to ask the Director General to review it. So her request of 29 November 1993 for review was over two years late.

On the merits the Agency points out that the Tribunal held in Judgment 1086 (in re Grünzweig and others) that the system it had brought in in 1987 was a "lawful and proper" response to a recommendation from the International Civil Service Commission. So the matter is res judicata and not open to challenge. Since she did not qualify for the allowance under the rules there was nothing arbitrary about refusing to pay it.

D. In her rejoinder the complainant maintains that her complaint is receivable: she appealed on 23 July 1991 against non-payment of her allowance but got no reply. What the Tribunal held in Judgment 1086 was that the new rule complied not with the Commission's recommendation, which required paying

a lump-sum allowance on completion of service, but with the Fleming principle.* She presses her claims.

E. In its surrejoinder the Agency presses its objections to receivability and observes that the Commission, though recommending alignment with the Fleming principle, did not call for unconditional payment of the allowance.

CONSIDERATIONS:

1. The complainant joined the Agency in 1983 as a clerk/typist at grade G.5. On 13 June 1991 she submitted her resignation, which was to take effect at 18 July, and the Agency accepted it.

2. She supplies the text of a letter which she says she wrote on 23 July 1991 to the Director of the Division of Personnel in which she pointed out that her "reason for leaving the organization has no bearing whatsoever" on her entitlement to payment of an end-of-service allowance and that it was unfair of the Agency to withhold it. She further alleges that she sent reminders in the same terms on 14 August and 10 September 1991. The Agency states in its reply that it has no record of having received any of those three letters from her.

3. On 29 November 1993 she wrote to the Director General mentioning her earlier "repeated requests" and stating that at the time of her departure in 1991 the Agency had withheld the end-of-service allowance for reasons which she considered "unjustified and discriminatory". In his reply of 2 December 1993 the Director of Personnel told her that there was no trace of any written communications from her on the subject and he confirmed on the Director General's behalf that no end-of-service allowance was payable to her. That is the decision which she is impugning.

4. Since for the reasons set out below the complaint fails on the merits there is no need to entertain the Agency's objections to receivability.

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* For an explanation of the principle, see Judgment 1086 under B and 1.

5. It is common ground that until 1987 the Agency made a 3 per cent addition to the pay of its staff in the General Service category to reflect the value of the end-of-service allowance (Abfertigung) which was paid to local employees in Vienna under Austrian law. On a recommendation by the International Civil Service Commission the Agency introduced in 1987 a lump-sum end-of-service allowance for such staff so as to bring its own pay policy more closely into line with practice among local employers. In Judgment 1086 (in re Grünzweig and others) the Tribunal held that that new policy, which the Agency had embodied in Provisional Staff Rule 4.06.6, was in keeping with the Fleming principle, which requires that the pay of General Service staff be determined on the basis of the best prevailing conditions of service in the locality of their duty station.

6. Rule 4.06.6 reads:

(A) Staff members in the General Service category at Headquarters shall be eligible for an end-of-service allowance as set out below:

1) upon expiration of contract ...

2) upon retirement ...

3) upon termination of contract ...

4) upon death after three years or more of continuous service ...

5) upon resignation after childbirth, after five years or more of continuous service ...

6) upon resignation after three or more years of continuous service with the Agency to join another United Nations common system organization without break of service ...

(B) An end-of-service allowance is not payable in cases of i) summary dismissal, or ii) abandonment of post, or iii) resignation except for reasons specified in paragraphs A(5) and (6) above."

7. According to section 23, subsection 7, of the Employment Act of Austria (Angestelltergesetz), the end-of-service allowance is not due if the employee resigns or leaves without due cause before expiry of the contract of service or has been guilty of conduct warranting dismissal. Under the Act the allowance is payable on resignation only (i) where the male

employee has reached the age of 65, or the female employee the age of 60, and has a record of at least ten years' unbroken service or (2) where the female employee has a record of at least five years' unbroken service and has resigned following childbirth.

8. The complainant argues that Rule 4.06.6(B) is unlawful on the grounds that the allowance was incorporated into pay scales for General Service staff and paid each month up to 1987 and entitlement to it used therefore to be based "on the mere fact of employment". She further contends that inasmuch as the Agency does not offer its staff the security of long-term employment it is acting unlawfully in applying a condition that is dependent on such security.

9. Both her arguments are unsound. As the Tribunal held in Judgment 1086, under 7:

> "Replacing the system in force from 1972 with another one that was closer to the statutory scheme in Austria was not in breach of any acquired right."

Rule 4.06.6, which properly reflects the Fleming principle, has been in force since 1987 and its lawfulness is no longer open to challenge.

10. Since the complainant's resignation did not fall within Rule 4.06.6 she is not entitled to payment of the end-of-service allowance.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas Mark Fernando Julio Barberis

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re GILL (No. 2)

Judgment 1479

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Nirmal Gill against the International Atomic Energy Agency (IAEA) on 28 March 1994 and corrected on 14 February 1995, the IAEA's reply of 31 May, the complainant's rejoinder of 12 July and the Agency's surrejoinder of 18 September 1995;

Considering Articles II, paragraphs 5 and 6, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information relevant to this complaint and the complainant's career at the Agency is set out under A in Judgment 1478, also delivered this day, on her first complaint against the IAEA.

Rule 5.01.12(B) of the Agency's Provisional Staff Rules empowers the Agency to reclaim any sum wrongly paid to a staff member provided it does so "within two years from the date" of payment.

In August 1990 the complainant travelled from Vienna, where the Agency has its headquarters, to attend an official meeting at Canberra, in Australia. The Agency advanced her a sum of money to cover its estimate of her travel expenses.

The complainant having resigned in June 1991, the head of the Operations Section of the Agency's Division of Budget and Finance asked her in a letter of 6 November 1991 to pay back 610.27 United States dollars, the amount by which the sum she had declared as the actual expenses of her travel to Canberra and back to Vienna had fallen short of the amount of the advance from the Agency. In the absence of a reply from her the head of the Section again asked her in a letter of 26 April 1993 to pay her debt.

In a letter of 17 November 1993 the head of the Staff Administration Section told the chief of Personnel Administration at the United Nations Industrial Development Organization (UNIDO), where she had since taken up employment, that, the Agency having failed to recover the $610.27, he would like UNIDO to help.

In a letter dated 24 November 1993 to the Director General of the Agency the complainant observed that the Administration had failed to claim the "disputed payment" in "the following 9-10 months of my employment with IAEA or again, at the time of my final separation in June 1991". She said that the "tone" of the letter of 17 November, which she had seen, "could be described as libellous" and she sought review of the matter. There followed correspondence in which the Agency said, and she denied, that it had given her timely notice of its claim to the money.

In a letter of 13 December 1993 she asked the Director General for leave to put her case directly to the Tribunal, alleging that the purpose of the letter of 17 November had been to damage her reputation and career prospects. By a letter of 29 December 1993 the acting Deputy Director General in charge of Administration told her that the Agency was pressing its claim to payment and that, although her appeal was time-barred, the Director General was waiving the complainant's obligation to go to the Joint Appeals Board.

B. The complainant accuses the Agency of a "deliberate intent to discredit" her and blight her career. Since it took over three years to seek repayment its claim was time-barred. Its letter of 17 November 1993 to UNIDO - her new employer - made her out to be dishonest and, what is worse, was written at a time when the Organization was applying a policy of staff retrenchment. UNIDO was "looking for an excuse to get rid of" her, and the "timing, nature and tone" of the Agency's letter suggest that the real purpose was to give UNIDO that excuse.

She seeks awards of 1 million United States dollars in damages for harm to her reputation, $1 million in moral damages, $1 million in damages for material and professional injury and $5,000 in costs.

C. In its reply the IAEA submits that the complaint is irreceivable insofar as she has failed to show how the injury she alleges might constitute breach of the terms of her employment. According to the case law the Tribunal is not competent ratione materiae to rule on a complaint alleging libel.

In subsidiary argument on the merits the Agency contends that its attempts to recover from the complainant the sum overpaid were lawful and neither impaired her standing at UNIDO nor caused her any other injury. In a telephone conversation with the head of the Staff Administration Section she acknowledged receiving "letters" from him; since the only letters he had ever sent her were the ones seeking recovery within the time limit in Rule 5.01.12, the Agency plainly did give her due notice of its claim.

D. In her rejoinder the complainant charges the IAEA with "lying" about its earlier attempts to claim money from her. She presses her charges of malice and her claims. She further asks the Tribunal to "censure" the Agency for "fabricating evidence".

E. In its surrejoinder the IAEA insists that what she is objecting to is not a challengeable decision. In any event there is no basis in fact or in law for her allegations.

CONSIDERATIONS:

1. The Agency employed the complainant at Vienna from 1 August 1983 until 18 July 1991, when her resignation took effect. In this complaint she is seeking from the Agency damages for injury to her reputation and for material, professional and moral injury, and costs.

2. In August 1990 the Agency sent her to Canberra to serve as a clerk/secretary at a seminar it was holding there. It paid her an advance to meet her travel expenses but required her to file a claim showing the expenses she had actually incurred.

3. The Agency states that on 6 November 1991 the head of the Operations Section of the Division of Budget and Finance wrote to her at an address in Vienna. In his letter he said that a review of the accounts had revealed that the amount of $610.27 overpaid to her for the duty travel in August 1990 had not been deducted from her final entitlements, and he asked her to refund that amount. She maintains that she never received that letter.

4. The Agency did nothing further about the matter until 26 April 1993, when the head of the Operations Section sent her another letter at the same address stating that it understood her to be working at the United Nations Industrial Development

Organization (UNIDO) and saw no reason why she should not pay the sum she owed to the Agency. The complainant denies receiving that letter too.

5. On 17 November 1993 the head of the Staff Administration Section wrote in the following terms to the chief of the Personnel Administration Section of UNIDO:

> "We have been attempting to recover an amount of US$610.27 from former Agency staff member Ms. Nirmal Gill, who is now employed by UNIDO. Our Division of Budget and Finance has written twice to Ms. Gill (copies attached) to no avail.
>
> I should be grateful for any assistance you may be able to provide in enabling us to finalize this matter."

6. In a letter of 24 November to the Director General of the Agency the complainant said that the "tone" of the letter of 17 November "could be described as libellous" and she asked why the "disputed payment" had not been brought to her attention and why no attempt had been made to recover it in the nine or ten months after her return from the mission while she had still been at the Agency, or else when she had resigned.

7. After further correspondence with the Division of Personnel she wrote to the Director General on 13 December 1993 to say that the letter of 17 November 1993 had been "written with the deliberate intent to discredit [her] and to damage [her] prospects". She asked for waiver of her obligation to go through the internal procedure of appeal.

8. By a letter dated 29 December 1993 the acting Deputy Director General answered her on the Director General's behalf:

> "... the Agency's claim for re-imbursement by you of US$610.27 stands.
>
> Although your letters of 6 and 13 December 1993 were not submitted within the time limit in Staff Rule 12.01.1(D) and your appeals therefore are time-barred, I wish to advise you that the Director General agrees to waive the jurisdiction of the Joint Appeals Board so that you may, if you so wish, appeal directly to the Administrative Tribunal ..."

She accordingly filed this complaint impugning the decision of 29 December 1993.

9. Rule 5.01.12(B) of the Agency's Provisional Staff Rules reads:

> "Payments or other benefits which a staff member, although not entitled to, has received in good faith, may be reclaimed by the Agency only within two years from the date on which such payment was made or such benefits were granted."

In its letter of 6 November 1991 claiming repayment by the complainant the Agency made no mention of that Rule. What it did say was that it was "attempting to settle all such items prior to the review of the External Auditors" and would appreciate it if she "could refund" the amount. It concluded with an expression of thanks for her "understanding in this matter". It did not explain why the Division of Budget and Finance had taken sixteen months to discover that she had been overpaid for travel expenses. What is more, though it sent its letter to a private address in Vienna, there is no evidence before the Tribunal to indicate what steps it took to ensure that she was actually resident at that address or would eventually receive its letter. And it sent to the same address the reminder of 26 April 1993 referred to in 4 above.

10. The crucial issue is whether the complainant was duly informed of the Agency's claim. To show that she was, the Agency relies on an internal memorandum which the author of the letters of 6 November 1991 and 26 April 1993 - the head of the Operations Section - wrote on 8 December 1993 to the Director of the Division of Personnel. The memorandum says:

> "The only evidence that I can submit in respect of the receipt of the earlier letters is the telephone conversation I had with Ms. Gill. In this conversation Ms. Gill acknowledged that she had received letters (plural) from me on this matter. As I have only sent 2 letters to her, one could presume that she had received both of them."

11. The Agency must show that it not only made its claim but also informed the staff member thereof within the time-limit in Rule 5.01.12(B). The memorandum by the author of the letters is inadequate to prove that the Agency duly informed the complainant of its claim and so met the requirements of the Rule. The letter of 6 November 1991 claiming repayment is therefore of no effect in law. By maintaining its claim to reimbursement in its letter of 29 December 1993 - the impugned decision - the Agency misinterpreted Rule 5.01.12(B) in that it had failed in its duty to ensure that the complainant was informed of the claim within the time-limit in the Rule.

12. The Tribunal has often affirmed the principle of good faith by which international organisations are bound and their duty to treat their staff members with consideration and fairness. It has also affirmed - for example in Judgment 946 (in re Fernandez-Caballero) - the staff member's right to be kept informed of any action that may affect his legitimate interests. It is true that in this case the Agency failed to notify its claim to the complainant properly and so to exercise due care in its application of Rule 5.01.12(B). But the complainant, for her part, has failed to show that she has suffered any material or professional injury on that account or such moral injury as would warrant an award of damages. Her claim to damages on those counts must therefore be dismissed. As to her claim in her rejoinder to the censoring of the Agency for "fabricating evidence", it fails because she offers not a shred of proof in support of her allegation.

13. Since the complaint fails in any event on the merits for the reasons set out above there is no need to entertain the Agency's objections to receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mark Fernando

Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re GILL

Judgment 1480

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Nirmal Gill against the United Nations Industrial Development Organization (UNIDO) on 8 April 1994 and corrected on 14 February 1995, UNIDO's reply of 1 June, the complainant's rejoinder of 12 July and the Organization's surrejoinder of 4 October 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1952, joined UNIDO in April 1980 as a shorthand typist at grade G.4. In June 1983 she resigned for personal reasons. On 29 October 1991 she returned to the Organization on a short-term appointment. It assigned her as a secretary at grade G.5 to the Industrial Operations Support Division of the Department of Industrial Operations. On 25 March 1992 it granted her a fixed-term appointment at grade G.4, which it renewed several times, the last time until 31 December 1993. In June 1992 it transferred her to the Industrial Operations Technology Division.

On 15 July 1993 the Director of the Technology Division told her, it seems, that the Division was unable to keep her on. In a memorandum of the same date to a personnel officer the complainant said that she would resign on 31 August 1993. By a memorandum of 21 July 1993 she withdrew her resignation on the grounds that the circumstances that had prompted it had changed.

On 4 November the chief of the Personnel Administration Section spoke to her about claims from people who had lent her money. According to her own record of their meeting in a memorandum of 8 November he said that she "had abused the confidence of the Organization" and that her appointment would expire at 31 December 1993.

By a memorandum of 11 November 1993 she told the Director-General of her plight and asked him to see her and to intercede.

In a letter of 17 November to the chief of Personnel Administration the head of the Staff Administration Section of the International Atomic Energy Agency (IAEA), which had formerly employed her, said that the Agency was trying to recover a debt from her, and asked for UNIDO's help.

On 24 November a personnel officer saw her and warned that her appointment would expire at 31 December 1993. She challenges the implied rejection of what she calls her "complaint" in her memorandum of 11 November 1993 to the Director-General.

B. The complainant submits that the decision not to renew her appointment is unlawful because UNIDO stated no reasons for it. The allegations that prompted the interview of 4 November 1993 were false and afford no proper grounds for the decision. And if the Administration intended to make use of the IAEA's letter of 17 November 1993 it should have followed the right procedure.

She asserts that the Director of the Technology Division promised her orally that her appointment would run into 1994.

She contends that the Organization plotted to get rid of her because it could not rely on staff retrenchment or the quality of her own performance as reasons for its decision.

She asks the Tribunal to quash the decision not to renew her appointment and to award her damages consisting of compensation for breach of promise in an amount equivalent to what her pay would have been for 1994, 1 million United States dollars for injury to reputation and another $1 million for material and moral damages. She seeks $5,000 in costs.

C. The Organization replies that the complaint is irreceivable. For one thing, there was no challengeable administrative decision on 4 November 1993, when the complainant saw the chief of Personnel Administration: not until 24 November was she told that her appointment would not be renewed. Besides, she failed to exhaust the internal means of redress. Her memorandum of 11 November to the Director-General was not an appeal within the meaning of Staff Rule 112.02, just a request for an interview with the Director-General.

On the merits the Organization denies terminating her appointment, which it says simply expired in accordance with Staff Rule 110.05. According to Rule 103.10 a fixed-term appointment, such as she held, carries no expectancy of renewal or of conversion to another type of appointment.

Besides, the Director-General may exercise discretion over renewal. The reason for the decision not to renew the complainant's contract was her conduct, which fell short of the standards expected of an international civil servant.

D. In her rejoinder the complainant presses her pleas. She denies that her conduct fell short and submits that UNIDO judged it solely on the strength of her debts. Yet her indebtedness did not impair her ability to work.

E. In its surrejoinder UNIDO maintains that her complaint is irreceivable and in any event devoid of merit. Having received claims from no fewer than a dozen of her creditors, it had "objective" reasons for not extending her appointment.

CONSIDERATIONS:

1. The complainant first worked for UNIDO from 1980 until 1983. She entered its service again in October 1991 as a secretary at grade G.5. Her fixed-term appointment expired on 31 December 1993; she is challenging the Organization's decision not to renew her appointment beyond that date, and her claims are as set out in B above.

2. There is dispute over the date at which the Organization took that decision. The complainant states that it was taken by the chief of the Personnel Administration Section at a meeting with her. The purpose of the meeting was to discuss her indebtedness to colleagues and others. She alleges that when she refused to say what she had done with an advance of salary the chief's answer was: "It's goodbye then". For its part UNIDO maintains that according to him any conclusions she has drawn from their meeting are quite unrelated to what was said. The Organization further submits that according to a "note for the record" dated 24 November 1993 a personnel officer had told her orally on that day that "she would receive a final certificate clearance within the next few days, as her appointment would be allowed to expire on 31 December 1993".

3. The reason put forward by the Organization for its decision is that the complainant's indebtedness was causing problems for staff from whom she had borrowed money and for her supervisors, who were being approached by people and institutions to whom she owed debts, and that her behaviour thus fell short of the standards expected of an international civil servant. The Organization cites what the Tribunal said in Judgment 53 (in re Wakley):

> "... defaulting on financial obligations and incurring debts beyond the debtor's capacity to repay within a normal period are incompatible with the standards of conduct required of an international civil servant and ... likely to bring the Organisation and its officials into public disrepute."

The complainant admits that she had incurred private debts and that there had been trouble over them as early as 1992. For its part the Organization took the quite proper view that, though it would not become involved in personal affairs, it expected a staff member to honour any financial obligations and would act if standards of conduct were such as to impair its own demonstrable interests or discredit it and its officials.

4. In a memorandum of 11 November 1993 to the Director-General she wrote:

> "On 4 November 1993 the Chief of Personnel Administration ... summoned me to her office and on a matter concerning my personal affairs, she levelled unsubstantiated allegations against me, interrogated me, and then informed me that my employment with UNIDO is being terminated effective December 1993.
>
> Even as late as 8 November no official justification was provided in support of the actions taken against me.
>
> In the absence of documentary evidence and in breach of contractual obligations it would appear that the decision to terminate my services was motivated by malafide intentions."

She went on:

> "I hope that you will consider what I believe is an unusual situation that unfortunately will require your personal intervention, and I would like to meet with you at your earliest convenience to discuss the matter."

5. She contends that since the Director-General did not reply to that memorandum she may come to the Tribunal in accordance with Staff Rule 112.02(b)(ii). Rule 112.02 reads:

> "(a) A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.
>
> (b)(i) ...
>
> (ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Secretary of the Joint Appeals Board; alternatively, the staff member may, within the following 90 days, apply directly to the Administrative Tribunal of the International Labour Organisation in accordance with the provisions of its Statute."

6. In several respects the complainant has failed to follow the correct procedure. Though her memorandum of 11 November 1993 spoke of termination, the Organization never took any decision to terminate her appointment: its decision was simply not to renew her contract on expiry at the end of 1993. Nor did she make any request in that memorandum for review of a final administrative decision: she merely sought a meeting with the Director-General. Actually no administrative decision was notified to her on 4 November 1993. The decision not to renew her contract was not notified to her until 24 November, and it was the only decision the Organization took in respect of her contract. Having made no challenge to it, she has failed to exhaust the means of redress available to her under the Staff Rules, and her complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute insofar as she is challenging the decision not to renew her appointment.

7. By July 1993 the complainant's debts to other staff had made for a situation at work in which Personnel Administration felt it had to intervene. By a memorandum of the fifteenth of that month to a personnel officer she tendered her resignation at 31 August 1993 and she alleges that, though she withdrew it in a memorandum of 21 July to the personnel

officer, she did so only on the strength of an oral promise by the Director of the Industrial Operations Technology Division to see that her "contract was renewed till the end of 1994". The Organization denies that there was any such promise.

8. The complainant's memoranda of 15 and 21 July do not support her plea. In tendering her resignation she stated:

> "Due to personal reasons, it will not be possible for me to continue working for UNIDO beyond 31 August 1993."

In withdrawing her resignation she explained:

> "There has been a reversal of my personal circumstances since [15 July], and I shall now be able to adhere to the original period of employment, i.e. till 31 December 1993."

She said nothing of any possibility or prospect of employment beyond 31 December 1993; indeed the language of the memorandum of 21 July is quite inconsistent with her having received the promise she alleges of employment up to the end of 1994. Her plea fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mark Fernando

Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re ANNABI

Judgment 1481

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kamal Annabi against the International Labour Organization (ILO) on 1 April 1994 and corrected on 5 April 1995, the ILO's reply of 29 June, the complainant's rejoinder of 4 September and the Organization's surrejoinder of 27 October 1995;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Tunisia who was born in 1940, worked for the Food and Agriculture Organization of the United Nations (FAO) from 1970 to 1987. In April 1987 he joined the International Labour Office, the ILO's secretariat, as chief interpreter at grade P.5 in the Relations and Meetings Department at headquarters in Geneva.

In a telex of 27 March 1987 to the Director of the FAO's Personnel Division the chief of the Office's Personnel Development Branch had said that the ILO would offer the complainant a fixed-term appointment for two years, but "he can expect to receive a without-limit-of-time contract in five to six years". He also said that the chief interpreter's was "one of the most secure posts in the ILO".

The ILO twice extended the complainant's appointment, to 30 June 1990 and then to 30 June 1992. In June 1992 it offered him another year, to 30 June 1993. On 8 June 1992 he saw the Director of the Relations and Meetings Department and asked why he was not getting a longer extension. In a minute of 9 June

the Director answered that for financial reasons he had "had to propose" abolishing the complainant's post at the end of the year.

On 27 November 1992 the complainant sent the Director-General a "complaint" under Article 13.2 of the Staff Regulations. On the strength of the telex of 27 March 1987 he sought, among other things, the grant of a contract without limit of time. On 26 January 1993 the Director of the Personnel Department replied on the Director-General's behalf that the telex made no commitment on the Organization's part.

In March 1993 the Organization decided not to abolish the complainant's post and on 29 April it offered him an extension of appointment until 30 June 1995. On 5 May 1993 the chief of the Personnel, Planning and Career Development Branch told him that it was "reasonable to anticipate that [he would] be taken into consideration" the next time there was a review to see who qualified for a permanent appointment. On 23 June he signed, albeit with reservations, the contract drawn up on 29 April.

On 27 October 1993 he filed another "complaint" with the Director-General against the decision of 29 April on the grounds that it refused him an appointment without limit of time. By a letter of 5 January 1994, the decision under challenge, the Director of the Personnel Department informed him of the Director-General's rejection of his "complaint" but promised that he would be "treated equally" with all other staff eligible for a contract without limit of time.

B. The complainant submits that the Organization has failed to show him good faith.

Judgment 782 (in re Gieser) set out, under 1, the conditions in which an official may have a promise fulfilled: it must be substantive; it must come from someone who is competent to make it; breach of it must cause injury to the person who relies on it; and the position in law must not have altered since the date at which it was made. All those conditions being met, the telex of 27 March 1987 constitutes an enforceable promise to grant the complainant an appointment without limit of time after five or six years' service.

He has a subsidiary plea, which he again founds on precedent, that the ILO thwarted his rightful expectations. The telex of 27 March 1987 swayed him in changing organisations: he would, but for the assurances the ILO gave him, have thought twice about giving up his permanent appointment at the FAO.

He asks the Tribunal to quash the decision of 5 January 1994, to have the Organization give him from 1 July 1993 an

appointment without limit of time and to award him moral damages and costs.

C. The ILO replies that the complainant is misreading Judgment 782. The Tribunal set out therein the criteria for determining not whether a promise has been made but whether it may be enforced. Besides, the telex of 27 March 1987 said "he can expect to receive", not "he will receive"; so it made no commitment but merely bred an expectation. What the precedents say about rightful expectations holds good only for termination or non-renewal, not for the grant of a permanent appointment.

Lastly, the complainant can expect such an appointment soon, though not by stealing a march on others.

D. In his rejoinder the complainant enlarges on his pleas. He objects to the Organization's "dilatoriness". In 1987 it made out that the post he was to take up was "one of the most secure" in the ILO; by 1992 it was mooting abolition. Judgment 782 does set out the criteria for determining the existence of a binding promise, and the words "he can expect to receive" in the telex of 27 March 1987 did amount to a commitment, not just engender an expectation. Else the wording would have been "he may expect to receive". And the ILO is wrong: there may be a rightful expectation also to the conversion of a fixed-term appointment into a permanent one.

E. The Organization presses all its pleas in its surrejoinder, maintaining that there was neither a binding promise nor denial of any rightful expectation.

CONSIDERATIONS:

1. The complainant used to serve the FAO as head of its Interpretation Branch. In 1986 the ILO advertised the post of chief interpreter; he applied and won the competition. The ILO granted him a fixed-term appointment for two years from 1 April 1987 and then several extensions. The last of them ran from 1 July 1993 to 30 June 1995. He accepted it only with reservations and lodged a "complaint" objecting to the ILO's refusal to let him have a contract without limit of time. He seeks the quashing of the decision of 5 January 1994 by which the Director of the Personnel Department told him of the rejection of his "complaint"; the grant of a contract without limit of time; and an award of damages for the moral injury he says the impugned decision has caused him.

2. His line of argument is straightforward: that the ILO broke a promise made at the time of recruitment to grant him a contract without limit of time in five or six years. He has a subsidiary plea that the impugned decision disappoints the rightful expectations the ILO's attitude had given him.

3. His main plea rests on a telex which the chief of the Personnel Development Branch of the ILO sent to the Director of the Personnel Division of the FAO on 27 March 1987, i.e. just before he was recruited. The telex confirmed that the ILO would offer him a contract for two years but added that he "can expect to receive" one without limit of time in five or six years and that the post was "one of the most secure" in the Organization. In the complainant's submission those phrases constituted an enforceable promise to convert his appointment in the stated lapse of time. And he draws a parallel with the case the Tribunal ruled on in Judgment 782 (in re Gieser) of 12 December 1986.

4. The Tribunal held in that judgment:

> "According to the rules of good faith anyone to whom a promise is made may expect it to be kept, and that means that an international official has the right to fulfilment of a promise by the organisation that employs him."

The promise must - the judgment went on - be substantive, "i.e. to act, or not to act, or to allow"; it must come from someone competent to make it; breach of it should cause injury to the person who relies on it; and the position in law must not have changed between the date of the promise and the date at which fulfilment is due. In that case the Tribunal was satisfied that the complainant might rely on a promise of conversion of his fixed-term appointment into a permanent one.

5. In this case too the wording of the telex denoted a substantive promise to convert the complainant's appointment within five or six years. Not only was it made by someone with authority to speak for the Organization but the obvious intent was that he should see it and be induced thereby to accept the offer.

6. The complainant has sustained injury from the ILO's failure to discharge its promise in time and from the Director-General's decision nearly seven years later to acknowledge no commitment towards him. His employment is the less stable on that account. What is more, there is no evidence of any change, between the time of the promise and the time by which the ILO should have kept it, in the ILO's rules about the seniority that qualifies someone for a permanent appointment.

7. There being no need to entertain the complainant's subsidiary plea about his rightful expectations, the conclusion is that the conditions that precedent requires are met. The Director-General was wrong to refuse him an appointment without limit of time and to grant him only two years from 1 July 1993. His case is sent back to the Organization so that it may take the action this judgment requires.

8. Though he claims moral damages for the ILO's treatment of him, this judgment may be deemed to afford him redress on that count.

9. Lastly, he is entitled to costs, and the amount is set at 5,000 Swiss francs.

DECISION:

For the above reasons,

1. The Director-General's decision of 5 January 1994 is set aside.

2. The complainant's case is sent back to the Organization so that it may act on the ruling in this judgment.

3. It shall pay him 5,000 Swiss francs in costs.

4. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

Michel Gentot Mella Carroll Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re RALSTON

Judgment 1482

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Barbara Joy Ralston against the United Nations Industrial Development Organization (UNIDO) on 1 April 1994 and corrected on 7 August, UNIDO's reply of 19 December 1994, the complainant's rejoinder of 7 April 1995 and the Organization's surrejoinder of 21 July 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1942, joined the staff of UNIDO in November 1985 as an industrial information officer at grade P.3 under a fixed-term appointment for two years. In 1989 UNIDO promoted her to grade P.4. It granted her three extensions of contract, the last of which was to run until 14 November 1994.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division told her that the Organization's financial straits required retrenchment of staff, her appointment was therefore "likely to be terminated in the near future" and the Administration intended to discuss the "modalities of separation" with her.

In a memorandum of 6 October to the Director she explained her personal and professional circumstances and asked him to review her case.

In the absence of a reply she asked the Director-General in a memorandum dated 8 November 1993 for his "assistance" or for a hearing. In another memorandum of even date she told the Director of Personnel what the loss of her job might mean for her family and said: "... should UNIDO insist on my agreed termination, it is clear that my children and I can only survive ... with a better financial arrangement".

In his reply of 10 November 1993 the Director expressed appreciation of her "interest in agreed termination", set out the terms of a financial settlement and described them as "the most" that UNIDO could offer. It would, he said, put her on special leave with full pay from 1 December 1993 until 30 September 1994 and on special leave without pay from 1 October 1994 until 30 November 1997. It would pay her a termination indemnity, repatriation grant, grants for the education of her two children in 1993-94, four-fifths of the costs of her travel and removal on repatriation, and insurance contributions.

On 12 November she wrote at the bottom of the Director's letter of 10 November: "I accept the above offer. In view of my financial situation I would request exceptional approval of 100% payment". In a memorandum also dated 12 November she told the Director that she accepted the offer but would like the Director-General to grant her a further month's salary in lieu of notice.

By a letter dated 26 November the Director told her that, noting that she had "requested an agreed termination", the Director-General had decided to terminate her appointment under Staff Regulation 10.3(c). (The text provides for the discretionary termination of fixed-term appointments.) The Director set out her entitlements.

On 3 December she signed a statement underneath the text of the Director's letter of 26 November confirming that she accepted the terms of termination under Regulation 10.3(c) and would "not contest this agreed termination".

B. The complainant impugns the implied rejection of the claim in her memorandum of 8 November 1993 to the Director-General. She submits that the "agreed termination" was unlawful because the Organization "forced" her to agree by threatening to dismiss her with only one month's notice and loss of financial benefits. By thus securing her consent under duress it failed in the duty of care it owed her. It was guilty of bad faith, misuse of authority and arbitrariness. It denied her right to appeal. It failed to explain why she rather than others had to go. Its real reasons were "personal", or else a desire to "advance the careers of [her] male colleagues".

She seeks: (1) material damages in an amount equivalent to what she would have earned at UNIDO up to the age of compulsory retirement, which is 60, plus the Organization's contributions to the pension and health funds and education

allowances for her children; (2) reinstatement, if feasible; (3) 50,000 United States dollars in moral damages if her claim to material damages is allowed, $300,000 if it is not, and $500,000 if the Tribunal holds that she was the victim of "racial and/or gender and/or national prejudices"; (4) some $100,000 in moral damages for her daughter; (5) some $50,000 in moral damages for her son; (6) the entry in her personal file of an "acceptable" letter of recommendation and the prior submission to her of any appraisals of her performance since 1991 that are to be put in that file; and (7) an order that, should she find another job while on special leave, "UNIDO may not refuse [her] permission" to hold it without explaining why it might be at odds with the Organization's interests. She claims costs.

C. In its reply UNIDO contends that the complaint is irreceivable. By 8 November 1993, the date of the memorandum in which the complainant says she submitted her claim, it had taken no "final administrative decision" on her case. Besides, all she sought in that memorandum was a hearing by the Director-General and his "assistance" in the request for review she had made in her memorandum of 6 October to the Director of Personnel. So she failed to exhaust her internal remedies, the challengeable decision being in the Director's letter of 26 November 1993.

In any event the reason why she did not challenge the termination of her appointment was that she had agreed to it and undertaken not to challenge it. She was under no duress, and the agreement is as binding on her as on the Organization.

On the merits UNIDO maintains that the termination of her appointment was a lawful measure taken for the sake of sound management and in the context of the retrenchment of staff. She knew full well the reasons for it before she consented to the generous terms on offer. In any event she had no legitimate expectancy of renewal up to the age of retirement.

There was nothing discriminatory about the retrenchment of staff: over fifty other officials, including men, left too. Besides, UNIDO did its best to heed the complainant's personal circumstances.

As for her claim to an "acceptable" letter of recommendation she has only to ask for a statement under Staff Rule 110.12 on the nature of her duties and the quality of her services. She may also obtain a report on her performance from January 1991 to December 1994 by applying for one under Staff Regulation 4.5 and Staff Rule 104.08.

D. In her rejoinder the complainant argues that her complaint is receivable and she enlarges on her earlier pleas. She maintains that she was discriminated against since according to the Administration's guidelines the retrenchment need not have affected her.

She broadens her claims. Under the head of material damages she claims compensation also for payment of her own contributions to the pension and health funds until she reaches the age of retirement. In the event of reinstatement, which she seeks in the form of a fixed-term appointment up to that age, she asks the Tribunal to order that an official whom she names should not be her supervisor and that UNIDO should "abstain from circulating negative information about [her] to other organizations in the UN system and ... support [her] in any future attempts" to find work in the system. She claims at least $10,000 in costs.

E. In its surrejoinder the Organization presses its objections to receivability and maintains that the agreement to terminate her appointment was lawful and binding. It observes that it has already assured her it would support her in seeking employment elsewhere.

CONSIDERATIONS:

1. The complainant joined UNIDO at its headquarters in Vienna on 15 November 1985 as an industrial information officer at grade P.3. She held a fixed-term appointment for two years. She had it thrice extended, the last time for three years from 15 November 1991. She was promoted to grade P.4 in 1989. Her complaint is that by a memorandum dated 4 October 1993 the Organization conveyed to her a decision to "end [her] employment prematurely"; that by a memorandum dated 8 November 1993 to the Director-General she made a request for review of that decision; that she did so in accordance with Staff Rule 112.02(a); that, the Director-General having failed to reply within sixty days, she might infer refusal; and that she appealed directly to the Tribunal within ninety days in accordance with Staff Rule 112.02(b)(ii) and Article VII(3) of the Tribunal's Statute.

2. Staff Regulation 10.3 includes the following provisions:

"(a) The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service.

(b) The Director-General may also terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and is not contested by the staff member concerned.

(c) In the case of a staff member with a fixed-term appointment which has been confirmed following completion of an initial period of probationary service, the Director-General may terminate the fixed-term appointment prior to its expiration date for any of the reasons specified in paragraphs (a) and (b) above or for such other reason as may be specified in the letter of appointment."

Article 10.6(a) says:

"If the Director-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. ..."

Staff Rule 112.02(a) reads:

"A serving or former staff member who wishes to appeal an administrative decision ... shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The staff member who receives no reply within sixty days may appeal to the Joint Appeals Board or to the Tribunal.

3. In the second half of 1993 UNIDO was carrying out an extensive exercise for the retrenchment of staff. An account of that exercise appeared in Judgment 1448 (in re Perez-Venero) under 2 to 4 and 6. At several meetings from 12 October until 12 November 1993 personnel officers of UNIDO discussed with the complainant the question of ending her appointment in the context of that exercise and the terms of termination. In the circumstances set out below the complainant signed four documents containing references to the "agreed" termination of her appointment.

4. The first was a letter of 10 November 1993 from the Director of the Personnel Services Division. The letter listed the payments that the complainant would receive on agreed termination, and he explained that those conditions would have to be approved by the Director-General and that her written request would be needed. On 12 November 1993 she added in her own handwriting at the foot of that letter words accepting the offer and requesting immediate payment in view of her financial situation.

5. Secondly, on the very same day, 12 November, she signed a memorandum which had been drafted in the Director's office and whereby she made a formal request for agreed termination and confirmed her acceptance of the terms offered in the Director's letter of 10 November.

6. The Director replied in a letter of 26 November:

> "... the Director-General, noting that in your memorandum dated 12 November 1993 to the Director, Personnel Services Division, you have requested an agreed termination of your fixed-term appointment, has decided to terminate your fixed-term appointment in accordance with Staff Regulation 10.3(c). This letter constitutes the official notice of termination which will take effect at close of business on 30 November 1997."

The letter then set out the terms. At the foot of the text there was also set out the following clause which the complainant was invited to sign, and which she signed on 3 December 1993:

> "I confirm my agreement to termination of my fixed-term appointment in accordance with Staff Regulation 10.3(c) (copy attached) and under the conditions outlined above and, accordingly, I will not contest this agreed termination."

That was the third document.

7. Fourthly and lastly, the complainant signed on 3 December 1993 a "personnel payroll clearance action" form in which her termination was described as having been "agreed" in accordance with Staff Regulation 10.3(c).

8. She filed this complaint on 1 April 1994. She pleads therein that the termination was unfair and flawed for several reasons: breach of the Staff Regulations and of due process; failure to give reasons for the decision; an abuse or misuse of the procedure for the reduction of staff calculated to put a new recruit on her post or to transfer another staff member to

it; the inducement of her consent to termination by deception, duress and the suppression of material information; discrimination on grounds of sex, race and nationality; and breach of the rules on redeployment. Her claims are as set out in B and D above.

9. UNIDO submits that her complaint is irreceivable. First, it argues, there was no final decision which she could have impugned in her memorandum of 8 November 1993; and in any event that memorandum made no request for review of an administrative decision, as Staff Rule 112.02(a) required. Secondly, the actual decision by the Director-General to terminate her appointment was communicated to her on 26 November 1993, and since she failed to ask for administrative review of it in accordance with Staff Rule 112.02 her complaint is irreceivable because she has failed to exhaust the internal remedies. Thirdly, the termination was an "agreed" one and fell within the meaning of Regulation 10.3(c); she is therefore not entitled to question it.

10. It is clear from the correspondence that what took place between the complainant and UNIDO from 12 October until 12 November was negotiation about termination and the terms thereof. As she herself acknowledges in her original brief:

> "The letter that I received on 4 October 1993, states that my contract might likely be terminated. It does not state that my contract will be terminated. In other words, I never received a letter from the Director-General specifically stating that he had made a decision to terminate my contract for ... specific reasons ..."

The "letter", or rather memorandum, of 4 October 1993 communicated no decision by the Director-General to terminate her appointment. So on 8 November, when she wrote her memorandum to the Director-General, she had not yet received an "administrative decision", within the meaning of Rule 112.02(a), about the termination of her appointment, the date at which it would take effect, or the terms.

11. Besides, in her memorandum of 8 November 1993 to the Director-General she merely complained that she had not yet had a reply to her memorandum of 6 October 1993 to the Director of Personnel and sought help in getting one; she described her qualifications and experience and, in an attachment, the consequences to her of termination; and she said she would like to see the Director-General. She did not ask him to review any decision, and so her memorandum was in any event not a valid appeal under Rule 112.02(a).

12. Insofar as her complaint seeks to impugn any action the Organization took before 26 November 1993 it is irreceivable under Article VII(1) of the Tribunal's Statute because she is not impugning a final decision.

13. Even supposing that her memorandum of 8 November had constituted a proper request for the review of an administrative decision, the express decision to terminate her appointment was communicated to her on 26 November 1993. She may not, once such express decision has been made, challenge under Article VII(3) of the Tribunal's Statute a rejection she infers from the Administration's silence during sixty days: see Judgment 532 (in re Devisme) under 5.

14. Since she agreed not to contest the decision of 26 November 1993 the termination was an agreed one. Even supposing that she had grounds for appeal against that termination she failed to submit an appeal to the Director-General within the time limit of sixty days in Rule 112.02(a). So again any appeal to the Tribunal against the "agreed termination" is irreceivable for failure to exhaust the internal remedies.

15. The conclusion is that the complaint is irreceivable in its entirety and that the complainant's claims must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re BROERE-MOORE

Judgment 1483

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 15 April 1994 and corrected on 6 August, UNIDO's reply of 14 November 1994, the complainant's rejoinder of 7 March 1995 and the Organization's surrejoinder of 12 June 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who has British and Dutch citizenship and was born in 1939, joined UNIDO's staff in Vienna on 19 May 1992 under a two-year appointment as chief of its Public Relations and Information Section at grade P.5. The contract was later extended.

At a meeting on 15 October 1993 with the Director of the Personnel Services Division she learned that UNIDO was to end her appointment. There followed correspondence between her and the Administration about the terms. In a letter of 19 November she told the Director-General that she would like a settlement that promised her "adequate financial resources" and continuing employment "in the UN system". By a letter dated 30 November 1993 the Director told her that the Director-General had decided to terminate her fixed-term appointment under Staff Regulation 10.3(c) as from 31 March 1995. Also on 30 November she signed a statement at the foot of that letter agreeing to its terms and waiving any right to challenge "this agreed termination".

In a letter of 27 January 1994 she sought the Director-General's help in fulfilling what she saw as her legitimate expectation of continued employment in the United Nations system. In his reply of 22 February the Director-General denied having given her any expectation of reassignment but promised to help her to find work elsewhere.

Having learned that UNIDO had put her former post up for competition, she asked the Director-General in a letter of 7 March 1994 to reinstate her or, failing that, assign her to an equivalent post.

Having got no answer, on 15 April 1994 she filed the present complaint challenging what she took to be the rejection of the claims in her letter of 19 November 1993.

B. The complainant submits that UNIDO terminated her appointment unlawfully. Her objections to termination are procedural and substantive. She charges the Organization with failing to state the reasons for termination and securing her agreement to it under duress. She pleads misuse of authority, breach of the rules on the retrenchment of staff, the overlooking of essential facts and discrimination against women. In her submission the Director-General fraudulently relied on what purported to be reduction of staff so as to replace her with someone more to his liking.

She seeks reinstatement in her old post or in an equivalent one "which will not be abolished", at grade P.5 or above, under a fixed-term appointment for seven years; or else damages in an amount equivalent to what she would have received in salary, allowances, pension and other entitlements from 1 January 1994 until retirement at the age of 62, plus interest at the rate of 10 per cent a year. She claims damages for impairment of her career prospects; the payment of removal expenses; damages for moral injury and injury to her health; an order that UNIDO give her an "acceptable" letter of recommendation and a list of posts for which she might qualify and which have been vacant, "frozen" or abolished since 4 October 1993; and an award of costs.

C. In its reply UNIDO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies open to her. She is wrong to treat her letter of 19 November 1993 as a request for review of a decision to terminate her appointment: not until 30 November 1993 did the Director of Personnel give her notice of that decision. Her letter of 19 November merely expressed hope that the Director-General would seek "an amicable solution" to her problems of employment, and it made no request for review of termination. She failed within the set time limit to seek review of the decision of 30 November.

On the merits UNIDO maintains that the termination shows no fatal flaws. The parties thoroughly negotiated the terms

over six weeks. There was no breach of the rules on the reduction of staff. Only in the context of agreed termination could she have got such generous financial and other advantages. UNIDO is not bound to state the reasons for agreed termination. In any event the decision was not arbitrary.

D. In her rejoinder the complainant maintains that her complaint is receivable, the Director-General having taken before 15 October 1993 the final decision to terminate her appointment and her letter of 19 November being a request for review of that decision.

She challenges the Organization's pleas on the merits and lodges new claims.

E. In its surrejoinder UNIDO maintains that the complaint is irreceivable and takes up issues raised in the rejoinder.

CONSIDERATIONS:

1. The complainant joined UNIDO in May 1992 as chief of the Public Relations and Information Section at grade P.5. She held a fixed-term appointment. She contends that the Director-General of the Organization ended her appointment in order to appoint someone of his own choice to her post and as a pretext made use of an exercise for the retrenchment of staff.

2. Staff Regulation 10.3 includes the following provisions:

"(a) The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reasons of health, incapacitated for further service.

(b) The Director-General may also terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and is not contested by the staff member concerned.

(c) In the case of a staff member with a fixed-term appointment which has been confirmed following completion of an initial period of probationary service, the

> Director-General may terminate the fixed-term appointment prior to its expiration date for any of the reasons specified in paragraphs (a) and (b) above or for such other reason as may be specified in the letter of appointment."

Staff Rule 112.2(a) reads:

> "A serving or former staff member who wishes to appeal an administrative decision ... shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The staff member who receives no reply within sixty days may appeal to the Joint Appeals Board or to the Tribunal.

3. In the second half of 1993 UNIDO was carrying out an extensive exercise for the retrenchment of staff. An account of that exercise appeared in Judgment 1448 (in re Perez-Venero) under 2 to 4 and 6. The Director of the Personnel Services Division informed the complainant orally on 15 October 1993 that a decision had been taken to terminate her fixed-term appointment. From 15 until 29 October personnel officers discussed with her the question of ending it in the context of staff reduction and the terms of termination. In a letter of 29 October to the Director the complainant stated that she would "be in a position to consider" those terms on her return from approved sick leave, which was to start the next day. In his reply of 1 November the Director listed the various payments that had been discussed. He said:

> "... if you wish the above conditions to be applied in your case, which would have to be approved by the Director-General, we would need your written request as soon as possible ..."

He made no reference, however, to any actual decision to terminate her appointment. While on sick leave the complainant replied in a letter of 17 November to the Director in which she went over in detail the terms she was being offered.

4. While she was still on sick leave the complainant wrote the Director-General a letter dated 19 November 1993 in which she said:

> "Please recall that it was only on 15 October that the Director of Personnel informed me of your decision to vacate and move me from my post, and to terminate my contract because of restructuring and staff reduction.

Therefore, I would be most appreciative of your kind consideration and approval, through the flexible approach discussed, for reaching an amicable solution, guaranteeing adequate financial resources and employment continuity in the UN system."

5. The complainant had a further discussion with the chief of the Personnel Administration Section on 26 November 1993 after her return from sick leave. On 28 November she wrote to the Director of Personnel as follows:

"I write with reference to the Director General's decision that I vacate my post to make way for recruiting another incumbent and consequently terminate my present contract but without reassigning me to another post which will not be abolished ... Since involuntary termination is the only alternative you give me to the various terms and payments put forward for terminating my contract, I have to accept the latter arrangement to lessen the consequent economic hardship and insecurity, as I am the breadwinner for my family."

6. The Director replied in a letter of 30 November:

"... the Director-General, noting that in your letter dated 28 November 1993 to the Director, Personnel Services Division, you have requested an agreed termination of your fixed-term appointment, has decided to terminate your fixed-term appointment in accordance with Staff Regulation 10.3(c). This letter constitutes the official notice of termination which will take effect at close of business on 31 March 1995."

The letter then set out in detail the terms of termination. At the foot there appeared the following clause, which the complainant was invited to sign and signed the same day:

"I confirm my agreement to termination of my fixed-term appointment in accordance with Staff Regulation 10.3(c) (copy attached) and under the conditions outlined above and, accordingly, I will not contest this agreed termination."

7. She submitted no appeal to the Director-General against the notice of termination dated 30 November 1993, and on 22 December 1993 she signed a "personnel payroll clearance action" form setting out the payments UNIDO was to make her.

8. At a chance encounter with the Director-General on 14 January 1994 she told him that she had not yet found

another post and was in financial straits. On 27 January 1994 she wrote to him referring to that encounter and saying that it had then been "understood, agreed and promised" between them that the Organization would find an equivalent post for her on its own staff or within the system of the United Nations by reassignment or transfer or otherwise. Though she said that it had not yet done so and asked him for "positive action to put the matter right", she did not seek review of the decision to terminate her appointment. In the ensuing correspondence the Director-General maintained that at no point in the extensive negotiations leading to the agreed termination and agreed financial package had UNIDO entered into any commitment to reassign her within the Organization or to find her employment elsewhere.

9. The complainant pleads in her rejoinder that a duly authorised official, the Director of the Personnel Services Division, had taken a final decision to end her employment prematurely and had communicated it to her orally on 15 October 1993; that that decision was embodied in a letter he had written her on 1 November 1993; that her letter of 19 November 1993 to the Director-General was a request under Rule 112.02(a) for review of that administrative decision and for an equitable solution; and that since the Director-General did not reply within sixty days she was entitled under Rule 112.02(b)(ii) and Article VII(3) of the Tribunal's Statute to appeal directly to the Tribunal.

10. In her original brief she submits that the termination was unfair and flawed for several reasons: breach of the rules and of due process; failure to give reasons for the decision; an abuse or misuse of the procedure for the retrenchment of staff calculated to put a new recruit on her post; the inducement of her consent to termination by deception, duress and the suppression of material information; discrimination on grounds of sex and breach of the rules on redeployment. Her claims are as set out in B above.

11. The defendant submits that her complaint is irreceivable. First, it argues, no administrative decision had yet been taken which she could have impugned in her letter of 19 November 1993; and in any event that letter made no request for review. Secondly, the actual decision by the Director-General to terminate her appointment was communicated to her on 30 November 1993, and she failed to ask for administrative review of that decision within the time limit of sixty days set in Rule 112.02(a). Thirdly, the termination was an "agreed" one and fell within the meaning of Regulation 10.3(c); not only did she expressly undertake not to contest it but by accepting the agreed payments she confirmed her agreement to termination.

12. It is clear from the correspondence that what took place between the complainant and UNIDO from 15 October until 28 November 1993 was negotiation about termination and the terms thereof; the letter of 1 November was only a part of such negotiation and neither embodied, nor referred to, any actual decision to terminate; and the Director-General had not at that date approved her termination. So up to 30 November 1993 she had not yet received an "administrative decision", within the meaning of Rule 112.02(a), about the termination of her appointment, the date at which it would take effect, or the terms.

13. Besides, her letter of 19 November 1993 was not a request for review of an administrative decision but just another step in the continuing negotiation: it was in any event not a valid appeal under Staff Rule 112.02(a).

14. Insofar as her complaint seeks to impugn any action the Organization took before 30 November 1993 it is irreceivable under Article VII(1) of the Tribunal's Statute because she is not impugning a final decision.

15. Even supposing that her letter of 19 November 1993 had constituted a proper request for review of an administrative decision, the express decision to terminate her appointment was communicated to her on 30 November 1993. She may not, once such express decision has been made, challenge under Article VII(3) of the Tribunal's Statute a rejection she infers from the Administration's silence during sixty days: see Judgment 532 (in re Devisme) under 5.

16. Since she agreed not to contest the decision of 30 November 1993 the termination was an agreed one. Even supposing that she had grounds for appeal against that termination her letter of 27 January 1994 was not an appeal which satisfied the requirements of Rule 112.02(a). So again any appeal to the Tribunal against the "agreed termination" is irreceivable for failure to exhaust the internal remedies.

17. The conclusion is that the complaint is irreceivable in its entirety and that the complainant's claims must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re THUILLIER

Judgment 1484

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pascal Thuillier against the World Health Organization (WHO) on 17 August 1994 and corrected on 18 October 1994, the WHO's reply of 30 January 1995, the complainant's rejoinder of 6 June and the Organization's surrejoinder of 12 September 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman born in 1961, joined the staff of the WHO on 5 April 1988 at its International Agency for Research on Cancer, at Lyons, as a laboratory technician at grade G.3. He held a short-term appointment which the Organization regularly extended until 30 September 1989. On 1 October he got a fixed-term appointment for two years.

In the first two reports appraising his performance, which covered the periods from 1 October 1989 to 30 September 1990 and from 1 October 1990 to 30 September 1991, Dr. Brigitte Pignatelli, his first-level supervisor, and Dr. Helmut Bartsch, his second-level supervisor, described his work as satisfactory. On 23 May 1991 the Organization extended his contract by two years to 30 September 1993.

His third appraisal report, on his performance from 1 October 1991 to 30 September 1992, said that "after some difficulties early in 1992" he had "changed his behaviour at work" and should "maintain his present attitude if his work is to remain satisfactory".

His fourth report, covering the twelve months from 1 October 1992 to 30 September 1993, showed a decline in

performance. In appended comments which he saw on 25 June 1993 Dr. Pignatelli criticised him for spending time on futile work, making a big order for supplies without telling her beforehand, despite instructions to cut down, and baulking at some of his tasks. She said that he had sent members of the unit a memorandum complaining that he had not been named as one of the authors of a paper. He had overestimated his contribution to positive testing of one mutagen and the discovery of another. Her recommendation was to withhold his within-grade step increment for six months.

On 2 July 1993 Dr. Bartsch asked to have his appointment extended by only six months, to 31 March 1994. He was so informed the same day. Feelings rose in July with a to-ing and fro-ing of memoranda between the complainant, his supervisors and the Administration. His supervisors' main objections were that he was not making proper use of analytical tools and his work was unreliable. In a memorandum dated 7 July Dr. Pignatelli took him to task over the order. By a memorandum of 5 August the Division of Administration and Finance said in answer to an enquiry from him of 9 July that the purpose of the six-month extension was to give him time to do better.

In a memorandum of 27 August Dr. Bartsch recommended ending his appointment forthwith. By a letter of 30 August the Director of Administration and Finance told him that, the Director of the Agency having agreed, he was summarily suspended from duty but would stay on the payroll until 31 December 1993, when his appointment would end for unsatisfactory performance.

On 27 September 1993 he lodged an appeal against dismissal with the headquarters Board of Appeal. In its report of 12 April 1994 the Board recommended rejection. By a letter of 17 May 1994, the challenged decision, the Director-General told him that he had endorsed the Board's recommendation.

B. The complainant submits that he was dismissed because Dr. Pignatelli had vowed to get rid of him. Relations between them soured after they had disagreed over his discovery of a "highly mutagenic molecule" and "positive testing of a mutagen" in August 1991. On the publication of the findings he tried in vain to win acknowledgment.

Why, he asks, did Dr. Pignatelli take so long to express criticism of his performance and the accuracy of his results? Though it was "tactless" of him to bruit his grievance about his contribution to research, Dr. Pignatelli used his behaviour as a pretext for "exaggerating her charges" against him. The

order he allegedly got wrong was someone else's fault. The WHO's unquestioning and unqualified support of Dr. Pignatelli amounts to misuse of authority.

He has two further pleas.

The first is that the WHO offended against Staff Rule 1070 on unsatisfactory performance. Had his performance suddenly become "unsatisfactory" the WHO should have let him show his mettle under another supervisor. He did not get the "reasonable time" that Rule 1070.2 prescribes in which to bring his performance up to par. He had to stop work before his six-month contract had even begun.

His other plea is that the WHO was bound under the law of contract to fulfil its promise to put him on trial for six months.

He seeks the quashing of the decision of 17 May 1994 to dismiss him and reinstatement under a two-year appointment as from the date of judgment, together with payment of any sums withheld by virtue of the impugned decision. In subsidiary claims he asks that he carry out his final six-month appointment under another supervisor. Whichever claim may succeed, he wants the equivalent of six months' salary in damages for "physical and moral injury" and 8,000 Swiss francs in costs.

C. In its reply the WHO submits that the complainant did not properly discharge his main duty, which was to analyse biological samples and make accurate reports on the results. Early in 1993 it lost confidence in his analyses. His errors were costly and undermined the Agency's reputation. The mistake over the order, which he did make himself, would have meant further waste of money had it not been caught in time. The WHO accuses him of being careless in storing laboratory samples and loth to carry out certain tasks.

He got a "written warning" under Rule 1070.2 and it spoke of his supervisors' appraisals in the third performance report and Dr. Pignatelli's comments appended to the fourth. The purpose of the six-month extension of his contract was to give him reasonable time to show improvement. When his work had collapsed and keeping him on put the Agency's good name at risk, the Organization was not bound to keep him in his post until the extension expired. Nor did it owe him another assignment, since the reason why his work was below standard was not that his duties were beyond him.

Dr. Pignatelli harboured no prejudice against him for finding the "new mutagen". The real reason for dismissing him was the decline in his performance, and it dated from early in 1992. He adduces no proof of misuse of authority.

D. In his rejoinder the complainant presses his plea that Dr. Pignatelli was prejudiced against him. No-one ever told him that his performance was wanting. The third appraisal report, which was vaguely worded, was no proper written warning.

E. In its surrejoinder the WHO restates its pleas, stressing that the decision to terminate the complainant's appointment was taken not by Dr. Pignatelli but by the Director of the Agency. It denies his charge of bias.

CONSIDERATIONS:

The application for an expert inquiry and hearings

1. In the complaint form the complainant says he does not want hearings, but in his rejoinder he applies for an expert inquiry and the hearing of witnesses in response to the objections about the quality of his performance and the criticisms of him by the Organization and, in particular, his first-level supervisor. In the light of what is said below the evidence he wants to produce is not germane to the outcome of the case, and there is therefore no call to allow it.

The gist of the case

2. The complainant, a Frenchman who was born on 28 May 1961, joined the International Agency for Research on Cancer at Lyons, an agency of the WHO, on 5 April 1988 as a laboratory technician at grade G.3. He held at first a short-term appointment for six months, which the Agency extended several times. From 1 October 1989 to 30 September 1991 he held a two- year appointment, which was renewed for a further two years from 1 October 1991 to 30 September 1993.

3. On 2 July 1993 he had his appointment extended by six months from 1 October 1993 to 31 March 1994. But by a letter of 30 August 1993 the Agency informed him that his appointment would end at 31 December 1993 and that he was summarily relieved of duty; despite warnings in his last annual report his work had become so poor that it could no longer be relied on for "scientific accuracy".

4. On 1 July 1993 his first-level supervisor had sent a memorandum criticising him to the Director of the Administration and Finance Division through her own supervisor. He was sent a copy. On 2 July 1993 his second-level supervisor approved his annual report. A memorandum of 5 August 1993 told him that his appointment had been extended by six months to give him reasonable time to do better and that, if he did not, his appointment would be terminated at the end of the six months, as indeed his second-level supervisor had warned in his annual report. On the recommendation of the headquarters Board of Appeal the Director-General confirmed on 17 May 1994 the decision to dismiss him.

5. The complainant's case is that the Organization failed to meet the formal and material requirements for early termination: it gave him neither enough warning before notifying its decision to him, nor a proper chance to improve, and besides, its criticisms were largely unwarranted.

6. The Organization denies the complainant's allegations. It contends that it did give him proper notice and did so many times both orally and in writing, and more particularly in the annual report of 2 July 1993; so the termination was lawful.

The material rules

7. WHO Staff Rule 1070 reads:

"1070 UNSATISFACTORY PERFORMANCE OR UNSUITABILITY FOR INTERNATIONAL SERVICE

1070.1 A staff member's appointment may be terminated if his performance is unsatisfactory or if he proves unsuited to his work or to international service. It shall be considered unsatisfactory performance if the staff member does not or cannot perform the functions of the post to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working.

1070.2 Prior to termination action, a staff member shall be given a written warning and a reasonable time to improve. If there is reason to believe that the unsatisfactory performance results from assignment to duties and responsibilities beyond the capacity of the staff member, consideration shall be given to reassignment to a post more suited to his abilities.

1070.3 A staff member whose appointment is terminated under this Rule shall be entitled to a notice period equivalent to that specified in Rule 1050.3.

1070.4 A staff member whose appointment is terminated under this Rule may, at the discretion of the Director-General, be paid an indemnity not exceeding one-half of the amount to which he would have been entitled if terminated under Rule 1050."

The foregoing rules mean that an appointment may not be terminated before the date of expiry on the grounds of unsatisfactory performance or unsuitability unless the staff member has had a written warning and been allowed enough time in which to improve.

8. Besides, according to general precepts of administrative law and the law of the international civil service an organization may not unilaterally take action that affects a staff member's status before letting him have his say: Judgment 1082 (in re Liégeois) affirmed that rule in 18:

"By virtue of their contractual relationship and the trust that therefore prevails between them, an organisation owes its employee a duty to declare its intention of dismissing him and to let him plead his case."

The same principle was set out in Judgments 1212 (in re Schickel-Zuber) under 2 to 4 and 1395 (in re Walter) under 6.

9. In this case it is plain that, although the complainant was informed of the objections to his work and behaviour he was never given any warning that was recognisable as such of the Organization's intention of ending his appointment before expiry. The Organization makes out that the annual report of 2 July 1993 afforded him ample warning. That is not so. Though the shortcomings reported therein prompted the Organization to extend his contract by only six months, instead of two years as before, to give him time in which to do better, he had no reason then to suppose that his appointment would be cut short. The decision he impugns shows a serious formal flaw and cannot stand. That being so, there is no need to rule on his other pleas.

10. The complainant is entitled to damages for the wrongful termination. His appointment was to have expired at 31 March 1994 and relations between the parties made any extension beyond that date unlikely anyway. So the amount that the Tribunal awards in material and moral damages is equivalent to the pay he would have received had his appointment expired at 31 March 1994.

DECISION:

For the above reasons,

1. The Director-General's decision of 17 May 1994 is set aside.

2. The Organization shall pay the complainant the equivalent of the amounts that he would have been paid had his appointment expired at 31 March 1994.

3. It shall pay him 2,500 Swiss francs in costs.

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re WASSEF (No. 7) Judgment 1485

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 14 December 1994, the FAO's reply of 1 February 1995 and the complainant's letter of 21 February 1995 telling the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's record of employment at the FAO, which he left on 7 January 1994, is set out under A in Judgment 1401 on his first and second complaints.

On 7 January 1994 he submitted an appeal to the Director-General claiming, among other things, payment of daily subsistence allowance and salary; entitlements to annual leave; and a continuing appointment at grade P.4 or, failing that, an award of moral damages. On 11 January he sent the Director-General further documents and thereby completed his appeal.

By a letter of 9 March 1994 the Assistant Director-General in charge of the Administration and Finance Department rejected his claims on the Director-General's behalf.

On 29 March 1994 he put his case to the Appeals Committee under FAO Staff Rule 303.1313 and Manual section 331.

B. The complainant submits that the FAO has infringed his rights and subjected him to "cheating and trickery". As in earlier complaints he finds fault with the Appeals Committee, which should, he maintains, have reported within six months of the filing of his appeal.

He asks the Tribunal to:

"1. award him the maximum of the compensation claimed of US $ 5 Millions for the inflicted atrocities, and

2. instruct the Administration of the Food and Agriculture Organization of the United Nations to raise, within two weeks from the receipt of the judgement subject to the penalty of another US Dollar Two Millions, the following separate payment authorizations ... :

2.1 Payment Voucher for 6 days' per diem for briefing in Rome, for my Libyan assignment, from 1 to 7 April 1982 amounting to US $ 348.00 (April 1982 rate 58 X 6),

2.2 Payment Voucher for 15 days' per diem for debriefing in Rome, for my Libyan assignment, from 1 to 16 July 1984 amounting to US $ 1,110.00 (August 1983 rate $ 66/day, July 1984 rate estimated by Complainant to be around $ 74/day),

2.3 Payment Voucher for 15 days' salary for debriefing in Rome, for my Libyan assignment, during July 1984 amounting to US $ 2,000.00 (indicative lump sum re salary only),

2.4 Payment Voucher for 3 days' per diem for briefing in Rome, for my Saudi assignment, from 17 to 20 December 1987 amounting to US $ 375.00 (December 1987 rate estimated by Complainant to be around $ 125/day),

2.5 Payment Voucher for 13 days' per diem for debriefing in Rome, for my Saudi assignment, during February 1991 amounting to US $ 2,470.00 ($ 190/day X 13),

2.6 Payment Voucher for 13 days' salary for debriefing in Rome, for my Saudi assignment, during February 1991 amounting to US $ 2,500.00 (indicative lump sum re salary only),

2.7 Payment Voucher for 7 days' per diem in Paris, for accompanying wife during medical evacuation and first cure, from 2 to 9 March 1992 amounting to US $ 1,491.00 ($213/day X 7),

2.8 Payment voucher for 5 days' per diem for briefing in Rome, for my Tchad assignment from 26 June to 1 July 1991, amounting to US $ 980.00 ($ 196/day X 5),

2.9 Payment Voucher with a detailed calculation for the difference due to me as a result of the recognition of my following entitlements and as a consequence;

a) the credit of my annual leave balance with the 7 days in Paris for accompanying wife during medical evacuation and first cure in March 1992, previously deducted from my annual leave or the payment of an indicative lump sum of $ 1,500.00,

b) the credit of my annual leave balance with the 9 compensatory days during my Saudi assignment in 1988, 1989 and 1990, or the payment of an indicative lump sum of $ 1,800.00,

c) the credit of my entitlements with the difference due from the recognition of the period between the Saudi assignment and the Tchad assignment as leave without pay (the recalculation of my terminal emoluments based on the continuity of service which becomes more than five years), or the payment of an indicative lump sum of $ 35,000.00.

2.10 Payment Voucher for the per diem in Rome, as a continuation of the Travel Authorization raised for my Repatriation Travel combined with medical evacuation in which payment of per diem was ended on 5/10/1993, for the period from 6/10/1993 to 23/12/1994 for the reasons detailed in this Complaint, and amounting to US $ 74,831.00 details of which are;

a) 15 days with the rate up to 60 days, from 5 to 20.10.1993 i.e. $ 219/day X 15 = $ 3285.00

b) from 20.10.1993 until the date I am clinically cured i.e. 24.12.1993 is 65 days X $ 166/day (reduced rate after 60 days) = $ 10,790.00

c) from 24.12.1993 to 23.12.1994, a period of 12 months as per the hospital reports for physical inability to travel and for the non assignment of part time work due to ill health; 366 days X $ 166/day = $ 60,756.00

3. declare and confirm his continuity status, his right for a continuing status and post from as early as June 1986, and

4. award him the payment of a lump sum of US $ 3,500 - for photocopies, postage, stationery, secretarial assistance, miscellaneous expenses, etc."

C. In its reply the FAO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal remedies open to him. Contrary to what he assumes, Article VII(3) of the Tribunal's Statute is inapplicable because the Organization took an express decision on his claim and his internal appeal is pending. According to the case law he may not infer rejection from the mere absence of a final decision within sixty days of lodging an appeal.

CONSIDERATIONS:

1. The complainant submitted an appeal on 7 January 1994 to the Director-General of the FAO seeking the following relief:

(a) recognition by the Organization that an illness which he had contracted in August 1993 - hepatitis-B - had been service-incurred;

(b) the grant of additional sick leave for the period from 16 November 1993 to 6 January 1994 and from 7 January to 7 March 1994;

(c) the prevention of his impending separation from service, of which he said a member of the Organization's Personnel Division had orally informed him in November 1993;

(d) the payment of daily subsistence allowance and salary during periods of "briefing" and "debriefing" for assignments he had carried out from 1982 to 1990;

(e) the payment of daily subsistence allowance for the period of briefing prior to his assignment to Chad in June 1991;

(f) the payment of the same allowance for an additional period for the evacuation of his wife to Paris in 1992;

(g) the addition of nine days to his annual leave entitlement at the end of his assignment in Saudi Arabia in 1990;

(h) the grant of leave without pay in the six-month period between his assignments in 1990 and 1991;

(i) the payment of daily subsistence allowance for the period in which he was on sick leave from 6 October 1993 to 7 January 1994; and

(j) his immediate transfer from Chad to a continuing P.4 post at FAO headquarters in Rome, or the award of 5 million United States dollars as "moral compensation (general and punitive) for the 12 years of humiliation, discrimination, injustice, worry, preoccupations, psychological and moral harassments, deprivation of rights and entitlements and all the consequences for the future".

2. By a letter of 9 March 1994 the Assistant Director-General in charge of the Administration and Finance Department informed him that the Director-General had rejected, among others, the claims in his appeal of 7 January on the grounds that they were either irreceivable or devoid of merit. On 29 March he appealed to the Appeals Committee against the Assistant Director-General's letter of 9 March. The Organization filed a statement with the Committee on 20 May 1994 and, the complainant having waived his right to submit a counter-statement, the written submissions on his appeal closed. Without awaiting the Committee's report and the Director-General's final express decision on his internal appeal he submitted this complaint on 14 December 1994 against what he sees as the implied rejection of that appeal. The many claims he puts forward in his complaint are set out in B above and, for the sake of convenience, are identified below by the numbers that he himself gives them.

3. In its reply to the complaint the Organization submits that his complaint as a whole is irreceivable because he has not awaited the outcome of his internal appeal and so has failed to exhaust the internal means of redress and to obtain a final decision, as Article VII(1) of the Tribunal's Statute requires. The Organization does not go into the merits but merely asks for leave to argue them should the Tribunal declare the complaint receivable.

4. The Tribunal need not entertain the FAO's general objection to receivability since the claims put forward in the complaint must all fail anyway for the reasons that are set out below. That being so, further pleadings are unnecessary.

Claim 1: damages for "inflicted atrocities"

5. This claim fails because the complainant is not challenging any final administrative decision or decisions and because its wording is too vague for it to be entertained. Insofar as it is by way of damages for moral injury that he may be deemed to be claiming an award of $5 million under this head the claim again fails because he has not validly challenged any unlawful act of the Organization's warranting the grant of such damages.

Claim 2.1: payment of daily subsistence allowance (DSA) for a briefing in Rome in April 1982, prior to his Libyan assignment

Claim 2.2: payment of DSA for a debriefing in Rome in July 1984, after his Libyan assignment

Claim 2.3: payment of salary for the same debriefing in Rome in July 1984

Claim 2.4: payment of DSA for a briefing in Rome in December 1987, prior to his assignment in Saudi Arabia

Claim 2.5: payment of DSA for a debriefing in Rome in February 1991, after his assignment in Saudi Arabia

Claim 2.6: payment of salary for the same debriefing in Rome in February 1991

6. As the Assistant Director-General's letter of 9 March 1994 pointed out, the complainant failed to file any of these claims within the time limit set in FAO Staff Rule 302.3171, which reads:

> "The right of a staff member to claim any ... payment existing but unpaid, shall lapse two years after the date on which the entitlement arose."

He has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires, and the claims are irreceivable.

Claim 2.7: payment of DSA for accompanying his wife in Paris from 2 to 9 March 1992

7. The Organization's decision rejecting this claim was notified to the complainant by a letter of 6 May 1992 from the acting Assistant Director, Administrative Services Division on the grounds that his stay in Paris from 3 March 1992 would be "charged", not as special leave with pay, but as annual leave and therefore no DSA was payable. Since he did not appeal to the Director-General within the ninety-day time limit set in Staff Rule 303.1311 for such appeal his claim is again irreceivable because of his failure to exhaust his internal remedies.

Claim 2.8: payment of DSA for a briefing in Rome in June-July 1991, prior to his assignment in Chad

8. A letter of 7 October 1991 from the Financial Services Division informed the complainant of the Organization's rejection of this claim on the grounds that he had been recruited in Rome. Not having appealed to the Director-General within the ninety-day time limit, he has again failed to exhaust the internal means of redress and on that account the claim is irreceivable.

Claim 2.9(a): adjustment of annual leave for accompanying the complainant's wife in Paris in March 1992 or payment of a lump sum in lieu

9. This claim fails for the same reasons as those set out in 7 above.

Claim 2.9(b): adjustment of annual leave for assignments in Saudi Arabia in 1988-90 or payment of a lump sum in lieu

10. The complainant first made this claim in a letter of 25 July 1990. The Organization's failure to take a decision within a reasonable time implied rejection and the complainant should again have applied within the prescribed ninety-day time limit for administrative review of such rejection. Since he did not, this claim too is irreceivable for failure to exhaust the internal remedies.

Claim 2.9(c): further entitlements due to the grant of leave without pay between assignments in 1990 and 1991 or payment of a lump sum in lieu

11. Whether in a period between two assignments an official is to be treated as on special leave without pay is an issue that can arise only when the later assignment is granted. So in this case the issue can have arisen only in June 1991, when the Organization granted him his last fixed-term appointment. Since he failed to apply for review within the time limit of ninety days in Staff Rule 303.1311, the claim is irreceivable.

Claim 2.10: payment of DSA in Rome from 6 October 1993 to 23 December 1994

12. It is not in dispute that the complainant was evacuated from Chad for reasons of health in August 1993 and was on "medical travel" status within the meaning of Rule 302.651. Manual paragraph 409.51 provides for the payment of daily subsistence allowance for a maximum of forty-five days during a period when a staff member is on such status. The complainant was entitled only to such payment, and his claim to more is therefore without merit.

Claim 3: the right to a continuing appointment

13. The complainant does not dispute that a decision was not taken on this claim until 8 March 1994. So there was no final decision on 7 January 1994, when he appealed to the Director-General, who correctly rejected it as irreceivable on the grounds that he was challenging no final decision.

Claim 4: costs

14. Since the complainant's claims fail in their entirety for the reasons set out above he is entitled to no award against the costs he claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Michel Gentot

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re WASSEF (No. 8) Judgment 1486

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 16 March 1995, the FAO's reply of 3 May, the complainant's rejoinder of 12 June and the Organization's surrejoinder of 28 July 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear under A in Judgment 1401, which dismissed the complainant's first and second complaints. He was employed by the FAO under short-term and fixed-term appointments from 1979. At the material time he was serving as an administrative officer at grade P.3 at N'Djamena, in Chad, on a project funded by the United Nations Development Programme. He left the Organization on 7 January 1994, when his fixed-term appointment expired.

Having caught hepatitis B in Chad, he needed medical treatment for which the Organization had him sent to Paris on 23 August 1993. In letters dated 13 September and 5 November 1993 he asked a medical officer of the FAO to acknowledge that his illness was service-incurred within the meaning of Manual paragraph 342.213, which reads:

> "... the death, injury or illness of a staff member is attributable to the performance of official duties when it:
>
> (i) ...
>
> (ii) was directly due to the presence of the staff member, in accordance with an assignment by the Organization, in an area involving special hazards to his health or security, and occurred as the result of such hazards. ..."

Replying on 10 November 1993, the medical officer set out the procedure for him to follow. In a letter of 22 November to the social security officer he submitted a claim.

By a letter of 7 December 1993 he asked the secretary of the Advisory Committee on Compensation Claims to review the rejection which he inferred from the Administration's failure to reply to his claim of 22 November.

In a letter of 4 March 1994 the secretary told him that his claim was rejected for want of proof that his duties had exposed him to the virus of hepatitis B and cited the provisions under which he might seek review.

In a letter to the secretary dated 16 March 1994 the complainant made a request for review of the decision of 4 March, and on 17 March the secretary, acknowledging receipt of his request, explained by what procedure a medical board would be convened.

The board met on 3 November 1994 and submitted a report to the Advisory Committee.

B. The complainant is impugning the implied rejection of his request of 16 March 1994. He submits that the FAO showed negligence in failing to have him vaccinated against hepatitis. It was wrong to require him to show how he had contracted the disease: in most cases doctors are utterly unable to tell how the patient has become infected. The medical board having concurred in that view, the FAO had only to declare his illness service-incurred.

He seeks acknowledgement that his illness was service-incurred and awards of at least 2 million United States dollars in moral damages, $1 million in "punitive" damages, and costs. He also claims the quashing of his separation; extension of authorised sick leave; refund of the costs of publication of the Tribunal's judgment in four American, four European and four Arab daily newspapers; leave from the Tribunal for a public discussion of "corruption" in the FAO; and a "penalty clause" which would apply if the FAO failed to execute the Tribunal's decision within 30 days of delivery.

C. In its reply the FAO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal remedies available to him. As the Tribunal held in Judgment 1401 on his first two complaints, he first has to get

a final decision from the Director-General in the light of a report from the Advisory Committee. This complaint being about the refusal to treat his illness as service-incurred, several of his claims are irrelevant anyway.

D. In his rejoinder the complainant objects to what he calls the "immoral procedural tactics" the Organization resorts to in its reply. There has, he observes, been a "considerable reasonable lapse of time" since he put his claim to the Advisory Committee. He presses his claims.

E. In its surrejoinder the FAO observes that he has not put forward any new evidence or pleas in his rejoinder. It maintains that the complaint is premature.

CONSIDERATIONS:

1. The main facts that have given rise to this complaint were set out, under A and 1 to 3, in Judgment 1401. It is not in dispute that the complainant caught hepatitis B in August 1993 while serving the FAO at N'Djamena, in Chad. Contending that the illness was service-incurred, he submitted in November 1993 a claim to the grant of compensation and benefits on that account under the rules.

2. In the FAO such a claim is processed in three stages:

First, the Advisory Committee on Compensation Claims inquires into the claim.

Secondly, if the Committee does not accept that the illness was service-incurred, the claimant may ask for reconsideration. The question is thereupon referred to a medical board consisting of three members, including a nominee of the claimant. After considering the board's report the Committee makes recommendations to the Director-General, who then reaches his decision. No time limits are set for recommendations or decision.

Thirdly, if dissatisfied with the decision, the claimant may appeal to the Appeals Committee, which makes recommendations to the Director-General. The Director-General's decision is not subject to further internal review.

3. By a letter dated 4 March 1994 the Advisory Committee informed the complainant that his claim to a declaration that his illness was service-incurred failed for want of sufficient evidence to show that the performance of his duties had exposed him to the hepatitis B virus.

4. As is explained in Judgment 1485, also delivered this day, on his seventh complaint, the complainant had already written to the Director-General on 7 January 1994 seeking a declaration that his illness was service-incurred. By a letter dated 9 March 1994 the Assistant Director-General rejected that claim on the Director-General's behalf on the grounds that no administrative decision had been taken on it by 7 January 1994, but pointed out that such a decision had been communicated to him on 4 March and he might ask for reconsideration.

5. By a letter of 16 March 1994 to the secretary of the Advisory Committee the complainant made a request for reconsideration of his case by that Committee. In a letter of 22 March to the Director of the Personnel Division he named his own doctor, Dr. Barlattani, to sit on the medical board that was accordingly to be convened.

6. It took four months to set up the board. The Organization's nominee was its chief medical officer, who proposed as chairman a doctor from London. Dr. Barlattani suggested for the sake of convenience two Italian doctors who were living in Rome, but the chief medical officer pressed his nomination on the grounds that the usual practice in the United Nations system was for the chairman not to be of the same nationality as the other members. Pointing out that if his claim failed the complainant would have to bear half the cost of attendance by the chairman, Dr. Barlattani then proposed three non-Italian doctors who lived in Rome. One of the three was at last appointed, in July, to chair the board.

7. The board did not meet for over three months. According to a report dated 3 November 1994 it agreed that "the exposure to hepatitis B in a sub-Saharan country like Chad has to be considered a special hazard because of the high prevalence of hepatitis B virus carriers in this area"; that "it was not possible in this specific case to establish the exact time and mode of transmission of the illness"; that "transmission by intimate or sexual contact and transmission by non-percutaneous or covert percutaneous contagion" were equally probable; that there were "no elements to doubt" the complainant's denial of sexual or other intimate contact; and that, "if one is to believe the patient", there was "a preponderance for the possibility of [his] having contracted the illness in unavoidable way for which he could not be held responsible".

Thus the board's finding, as summed up in the FAO's reply to this complaint, was that "the evidence weighed in favour of the view that the illness was service-incurred".

8. By a letter of 17 November 1994 the Director of the Personnel Division informed the complainant that the board's report had been forwarded to the secretary of the Advisory Committee. The complainant wrote five letters - on 17 November, on 7, 19 and 28 December, and on 12 January 1995 - asking when the Committee would make its recommendations to the Director-General so that he could calculate "the expiry date of the time limit" for the decision. The two replies dated 21 December 1994 and 19 January 1995 that he got from the Personnel Division said that the Committee had not yet met and that there were time limits neither for the submission of his case to the Committee, nor for the Director-General's decision, which he would be told "in due course"; if dissatisfied, he could then go to the Appeals Committee.

9. Nearly two more months having gone by without further news, he lodged this complaint with the Tribunal on 16 March 1995.

10. The FAO pleads that the whole complaint is irreceivable because the complainant has not exhausted the internal means of redress available to him against the decision communicated to him on 4 March 1994.

11. It is true that Article VII(1) of the Tribunal's Statute requires a complainant, before he files suit with the Tribunal, not just to apply for internal review but also to await the outcome of the internal proceedings. Yet that is not a hard-and-fast rule, even though the Statute does not allow any express derogation. If a complainant does his utmost to procure a decision, and if nevertheless the internal appeals body evinces by its statements or conduct an intention not to report within a reasonable time, justice requires that an exception be made. A mere failure to proceed with all proper speed and diligence is not enough: it is only if the proceedings have been so protracted that the delay is inordinate, unexplained and inexcusable that such an intention will be inferred: see Judgments 408 (in re Garcia and Márquez) and 451 (in re Dobosch).

12. The complainant brought this case one year after submitting his request for review of the decision of 4 March 1994. Not only was there needless delay in appointing someone to chair the medical board, but four months after the board's report had been sent to the Advisory Committee the complainant had not yet been given the slightest inkling of the date at which the Committee would meet. What is relevant is not only

the delay that had already occurred but the further delay which he still reasonably anticipated. To conclude the process of internal review such further delay was indeed inevitable: the Advisory Committee had to meet; it had to submit its recommendations to the Director-General; and the Director-General had to take his decision. If that decision did not give the complainant satisfaction there would be yet further proceedings before the Appeals Committee and thereafter the Director-General would take his final decision. Considering the tardiness of the proceedings up to the date of filing this complaint, 16 March 1995, the complainant was right to fear much more delay, quite out of proportion to the simple and straightforward issue involved: was his illness service-incurred?

13. The conclusion is that the complainant had done everything in his power to exhaust his internal remedies and that by 16 March 1995 it was quite clear that the internal process of review would not be concluded within a time which the Tribunal may regard as reasonable in the circumstances. Subsequent events confirm that view. In its reply the FAO says that the Advisory Committee met on 21 April 1995. Yet in its surrejoinder of 28 July 1995 it does not even say whether the Committee's recommendation has been put to the Director-General or whether he has taken his decision. Not even now is the end in sight. The complaint is therefore receivable.

14. When the defendant organisation submits a reply it must enable the Tribunal to render a complete ruling on the dispute. If it chooses to argue only procedural issues, that may - even if it does not so intend - amount to dilatory tactics that hold up the ruling, and the risk is that the Tribunal may treat the complainant's allegations of fact as established.

15. The FAO has stated in its reply to the complaint that it will not deal with the facts, and it confines itself to the issue of receivability. But the facts are simple, and no adjournment of the proceedings is justified. Hepatitis B is endemic in Chad. The complainant says that his functions included those of security warden, which put him in situations where there was bloodshed and exposure to contagion. For its part the FAO acknowledges in its reply, without demur, that the medical board's findings were that the evidence weighed in favour of the view that the complainant's illness had been service-incurred.

16. The Tribunal concludes that the complainant's illness must be assumed to have been directly due to his assignment by the FAO to an area posing a special hazard to his health, to

have occurred as a result of that hazard, and therefore to be service-incurred within the meaning of Manual paragraph 342.213. The case must go back to the Organization so that it may determine his entitlements accordingly.

17. The complainant makes several other claims which did not form part of his request of 16 March 1994 for reconsideration. Since he has not exhausted the internal means of redress the claims are irreceivable under Article VII(1) of the Tribunal's Statute and therefore fail. But he is entitled to an award of costs.

DECISION:

For the above reasons,

1. The complainant's case is sent back to the Organization so that it may determine his entitlements under the Staff Regulations and Staff Rules on the assumption that the hepatitis B which he contracted in Chad in August 1993 was incurred in the Organization's service.

2. The FAO shall pay him 2,000 United States dollars in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas Michel Gentot Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re BOUCHELAGHEM

Judgment 1487

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed Mr. Aissa Bouchelaghem against the World Tourism Organization (WTO) on 7 March 1995 and corrected on 28 April, the WTO's reply of 31 July, the complainant's rejoinder of 7 September and the Organization's surrejoinder of 27 October 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Algerian who was born in 1938, joined the WTO on 1 October 1981 as an administrative officer at grade P.3. From 1981 until 1991 the Organization gave him various assignments. On 11 November 1991 it made him chief of its Facilitation Department at grade P.4 on an indefinite appointment. He was also active in the Staff Association and was elected its chairman in June 1992.

On 14 December 1993 the Secretary-General saw him and warned that his post might be abolished. In a letter of 28 December to the Secretary-General he questioned the lawfulness of abolition and said it was prompted by his union work and therefore an act of discrimination.

The Secretary-General answered in a letter of 25 January 1994 rejecting the charge: the abolition of the complainant's post was, he said, the outcome of an overhaul of the secretariat and a decision which the Facilitation Committee and the Tourism Safety Committee had taken at a meeting on 12 and 13 July 1993 to join together. But he was, he said, "aware that the abolition of a post need not mean the incumbent must go" and he would see about a new assignment.

By a letter of 25 March 1994 the Secretary-General informed the complainant that his appointment would end because his post had been abolished and there was no other for him. On 25 April he wrote back challenging that decision. By a letter of 27 May the Deputy Secretary-General upheld it and informed him that his appointment would end at 5 June and he would be paid compensation in lieu of notice and a year's remuneration by way of end-of-service indemnity.

On 21 June he went to the Joint Appeals Committee. In its report of 17 October 1994 the Committee recounted the history of the dispute but found for neither side and made no recommendations. The Secretary-General rejected the appeal by a letter of 8 December 1994, the impugned decision.

B. The complainant alleges breach of freedom of association. He submits that his dismissal was an act of discrimination largely prompted by his work for the Staff Association. He is the only official to lose his job because of the structural reforms of the WTO. He produces written testimony from two earlier chairmen of the Staff Association and says that they left because the Organization had made "life and work too hard for them".

The WTO "contrived" reasons for doing away with his post. There was no call for merger of the two committees and the Organization's governing bodies never agreed to it.

He argues from Judgment 1231 (in re Richard) that the abolition of a post need not automatically entail the departure of the holder of it and that the Organization therefore had to find him another post.

Lastly, there was misuse of authority because the Secretary-General took the impugned decisions out of hostility towards him which he blames on a disagreement they had in 1991.

He seeks the quashing of the decision of 8 December 1994; reinstatement or an award of four-and-a-half years' salary and allowances in damages; and awards of six months' salary and allowances in moral damages and of costs.

C. In its reply the Organization points out that leaders of the Staff Association have to abide by its rules like anyone else. It denies victimising the complainant for staff union work and maintains that it dismissed him in application of stringent financial policy. The same policy dictated the merger of its two committees, which its governing bodies did approve. The incident of 1991 to which the complainant alludes had no bearing on the decision.

It could neither put him on any other post nor keep him on without a proper job to do. So it did not act in breach of the precedent in Judgment 1231.

Nor was there any abuse of authority. The two earlier chairmen of the Staff Association left "for personal reasons".

D. In his rejoinder the complainant develops his arguments. He maintains that the abolition of his post had no basis in law and that the Organization could have kept him on, either by giving him "ad hoc paperwork" or by resorting to "cross transfers". Officers of the Staff Association should enjoy at least as much protection as other employees. The WTO did misuse its authority.

E. In its surrejoinder the Organization objects to the "pointlessly argumentative" tone of the complainant's rejoinder. It says it could not keep his post and his lack of technical qualifications made reassigning him "out of the question". It neither showed him hostility nor got rid of him because of his work for the Staff Association.

CONSIDERATIONS:

1. The complainant joined the WTO in 1981 and his last post there was as chief of the Facilitation Department in the Programme Activities Division. A letter of 25 March 1994 informed him of a decision by the Secretary-General to dismiss him at 5 June 1994 because of the abolition of his post. On 27 May the Deputy Secretary-General upheld that decision, and he went to the Joint Appeals Committee. In its report of 17 October 1994 the Committee made no formal recommendation but expressed the view that "the ILO Tribunal, which will doubtless have to rule on the case, will find in the correspondence between the parties most of what it will need to know". By a decision of 8 December 1994, the one now impugned, the Secretary-General upheld the dismissal.

2. The complainant has four pleas. The first is that the impugned decision was in breach of freedom of association; the second, that it rests on an abolition of post that was unlawful and unwarranted; the third, that abolition need not mean that the incumbent must go, and indeed he is entitled to preference for assignment to other posts; and the fourth plea is misuse of authority. The first and fourth pleas are linked in that the complainant attributes his dismissal to his work for the Staff Association. But the Tribunal will first take up

his second and third pleas: in sum, did the Organization give sound reasons for abolishing his post and for not transferring him to another one?

3. Abolition of the complainant's post came after the merger of two bodies, the Facilitation Committee, which the WTO had set up in 1978 and which the complainant's unit was servicing, and the Tourism Safety Committee. On the evidence the two had much in common and were tending to overlap because the safety of tourists and their better protection are priorities of what the Organization calls "facilitation".

4. The complainant admits that it is not for him to say whether the reforms ordered by the Secretary-General were good or bad. He contends that when the committees merged it was wrong to say that merger was what their own members wanted; that the decision should have been put to the Organization's Executive Council for approval; that in any event the merger did not require the abolition of his post, the more plainly so because a non-permanent staff member was assigned to a new section which the merger engendered and which was responsible for the "quality of tourism"; and that the reasons the Organization gave for abolition of his post were fabrication.

5. There was nothing wrong with the Organization's making reforms for the sake of greater efficiency, especially when it was in financial straits that called for cost-cutting. Unfortunately there is no trace of the tape recordings of what was said at the committees' joint meeting on 12 and 13 July 1993. But there is evidence to show that the members did agree to the merger, that the meeting led to administrative reforms by the Secretary-General and that the Executive Council expressly approved them in May 1994.

6. The sequence of events up to merger was as follows. The committees held their joint meeting on the recommendation of the Technical Committee for Programme and Coordination, a body set up by the Executive Council. In a report dated 27 April 1993 to the Council the Technical Committee had said:

> "An innovation in the proposed programme is the merging of facilitation and health activities into one area designated as Quality Support Services. This was considered a logical step, taking into account the growing importance of health and safety in tourism and the changing focus of facilitation towards improving the quality of tourism services and reducing the administrative and fiscal impediments facing tourists."

By a resolution of 20 May 1993 the Council approved the general programme that the Technical Committee had proposed. The

General Assembly too gave its approval at a meeting in Bali in October 1993. The Secretary-General thereupon submitted a report to the Council in May 1994. It said that responsibility within the secretariat for facilitation had been conferred on the officer already in charge of the health and safety of tourists and facilitation, all under the heading "quality of tourism", the aim being greater efficiency and the more economical use of staff. Lastly, the Council approved at its 48th Session (12-13 May 1994) the administrative reforms described above. So the complainant is wrong to say that the merger went through without approval from the competent bodies and was not in the Organization's general interest.

7. The reforms did mean abolishing the complainant's post as chief of Facilitation since the department itself was to go. But was it also inevitable that the holder of the post should go? He says not: in his submission the Organization should at least have found him another suitable job, even a "fictitious" one of the kind that several other officials have.

8. The plea fails. It is true, and the Organization admits, that the abolition of a post need not mean that the employee on it must go. As the Tribunal held in Judgments 269 (in re Gracia de Muñiz) and 1231 (in re Richard):

> "... an organisation may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment."

But here it is plain from the evidence - for example the Secretary-General's letter of 25 March 1994 - that the Secretary-General did look thoroughly into the possibilities of reassignment, but he found no suitable post because of the complainant's grade and because there were but few permanent posts, and even fewer that were vacant or likely to become so. And even if the complainant is right in saying that positions devoid of content were not utterly unknown in the Organization, there was obviously no question of putting him on a "fictitious" post.

9. The rest of his case comes down to one plea: misuse of authority. He alleges that the Secretary-General acted from improper motives and dismissed him out of personal dislike because he was chairman of the Staff Association. So the misuse of authority was, in his submission, compounded by breach of freedom of association.

10. As did the Joint Appeals Committee, the Tribunal "can understand that the complainant wonders whether he was discriminated against, being one of the few to have been

dismissed in recent years". But there can be no presumption of bad faith or misuse of authority on the Organization's part. And no item of evidence, more particularly not the testimony of earlier chairmen of the Staff Association, suggests that prejudice against officers of the Association led the WTO to commit such a serious breach of their acknowledged rights as staff representatives. Nor is there any evidence that the dispute the complainant had with the Secretary-General in 1991 bred any abiding dislike towards the complainant or that such dislike accounts for the impugned decision.

11. The conclusion is that the decision was taken in the Organization's interests and not for any improper reasons. So the complainant's claims to the quashing of it and to awards of damages and costs must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SCHORSACK

Judgment 1488

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Barbara Schorsack against the European Patent Organisation (EPO) on 25 October 1994 and corrected on 25 November, the EPO's reply of 15 February 1995, the complainant's rejoinder of 17 May and the Organisation's surrejoinder of 22 June 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich and is responsible in the main for the substantive examination of patent applications.

Since 1990 the EPO has been receiving many more applications for international preliminary examination under Chapter II of the Patent Cooperation Treaty, which are known as "PCT applications", and subsequent applications for patents with European designations, which are known as "Euro-PCT applications". The fees the EPO was charging for PCT applications covered only part of the costs; so standard patent applications, for which the fees were higher, were indirectly subsidising PCT applications. The Administration and staff representatives started discussions on 12 June 1992 about how to lower the costs of processing them.

By a notice of 1 September 1992 the Vice-President in charge of DG2 informed the staff of measures, which were to take effect at once, to streamline the PCT procedure, change the Euro-PCT procedure and have examiners spend less time on each case. The Vice-President announced that he would set up a working party, including staff representatives, to discuss reform. He did so, and the working party reported on 27 November 1992.

By a note of 26 January 1993 the Vice-President gave examiners in DG2 notice of further reforms in PCT and Euro-PCT procedures and of changes in the Office's system of what it calls "points". For the patent applications an examiner processes he gets a number of points that determines in part his productivity and his general ratings. The changes lowered the value of each examination from 1 full point to 0.75 for a PCT application as from 1 February 1993 and to 0.55 for a Euro-PCT application as from 1 January 1994.

The complainant, who is German, is employed by the EPO in DG2 as an examiner at grade A3. On 5 March 1993 she and several hundred other staff members lodged internal appeals against the Vice-President's note of 26 January. In the edition of the EPO's Gazette for 1 June 1993 the Director of Staff Policy announced that the President of the Office had referred the appeals to the Appeals Committee. In its report of 1 June 1994 the Committee recommended by a majority that the President should allow the appeals. By a communiqué issued in the EPO Gazette in August 1994 the Director of Staff Policy informed the staff that the President had decided to reject the appeals. That is the decision under challenge.

B. The complainant submits that by consulting neither the General Advisory Committee nor a local one before the note of 26 January 1993 went out the Organisation was in breach of Article 38 of the Service Regulations. The measures announced in the note, since they apply to all examiners, concern "the whole or part of the staff to whom these Service Regulations apply" and accordingly had to form the subject of the prior consultation required by Article 38. It is immaterial that the Administration informed the staff of its plan to raise standards of productivity and "discussed" the matter with staff representatives on the Staff Committee: informal contacts of that sort do not dispense with the need for such consultation.

The change in the reckoning of points has affected many examiners adversely: lower ratings were the penalty for anyone who failed to meet the new standards of output. The reforms were the more objectionable for coming into force in the middle of a reporting period and being therefore retroactive. They offend against the principle of equal treatment since they bear most hardly on examiners who process the highest number of preliminary examinations.

The time-saving measures are neither lawful nor practicable and in no way warrant breach of the EPO's duty of consultation.

The complainant seeks the quashing of the decision on the reckoning of points for processing PCT and Euro-PCT applications as announced in the note of 26 January 1993 and a return to the old system. She wants the figures of productivity for "every examiner affected" to be corrected accordingly and their appraisal reports for 1992-93 and 1994-95 to be made or, if necessary, remade on the strength of the old system. She claims 10,000 German marks in costs.

C. In its reply the EPO contends that the complaint is irreceivable because it shows no cause of action. Having got a "very good" general rating for 1992-93, the complainant suffered no injury from the impugned decision.

In subsidiary argument the Organisation pleads that the President acted in the exercise of the administrative authority conferred on him by Article 10 of the European Patent Convention, which empowers him to adopt "administrative instructions" to ensure the functioning of the Office. Such measures are not covered by Article 38(3) of the Regulations. Why indeed did the staff representatives, who knew full well of the intended measures, wait until 26 January 1993 to ask for referral to the General Advisory Committee? At all events the Administration did seek, at meetings it held as early as 12 June 1992, to involve staff representatives, in keeping with Article 36(1), in the assessment of appropriate measures. Such consultations were anything but "informal".

As for the effect on examiners' ratings, the EPO stresses the importance of changes in the reckoning of points. Output is no longer the only factor of the general rating: quality now counts just as much. Besides, the saving of time due to the reforms of the PCT and Euro-PCT procedures has more than made up for any adverse effect on performance appraisal: since examiners have to spend less time on each application they should be able to process more. The old system was unfair because it did not grant points for actual work and was too generous to examiners who dealt with a higher number of PCT and Euro-PCT applications.

D. In her rejoinder the complainant maintains that because of the reforms an examiner's work takes longer. Lowering the number of points for PCT and Euro-PCT applications did not preclude a "very good" rating altogether but did make it harder to achieve. So the impugned decision was to her detriment.

In her submission Article 38 confers on the staff a fundamental right to consultation in the General Advisory Committee.

E. In its surrejoinder the EPO contends that she has failed to show that the time-saving measures did not lessen the time needed to examine a PCT or Euro-PCT application.

CONSIDERATIONS:

1. This complaint raises a single substantive issue: whether the Organisation should have consulted an advisory committee before sending all EPO patent examiners a note dated 26 January 1993 about their processing of PCT and Euro-PCT applications.* The note set out what it described as "streamlining measures" and a new system of granting points to examiners for processing such applications.

2. The background to the note was as follows. A standard European patent application does not take so long for an examiner to process as one for international preliminary examination in accordance with Chapter II of the Patent Cooperation Treaty, known as a "PCT application". The procedures the EPO follows are not the same for the two sorts; and the fees that the Organisation charged for standard processing used to cover more of actual costs than the fees it charged for the PCT one. The number of PCT applications rose from 3,700 in 1990 to 6,6[illegible] in 199[illegible] and to 8,650 in 1993. In June 1992 the President made a proposal to the Administrative Council for an increase of the fees that the EPO charged for a PCT examination from 2,800 to 3,600 German marks. But the Council agreed to increase the fees only to 3,000 marks as from 1 October 1992. So the Organisation then set about reducing costs by "streamlining" the procedure and having its examiners spend less time on PCT applications.

3. By a staff notice dated 1 September 1992 the Vice-President of the Office in charge of Directorate-General 2, which is responsible for substantive examination, announced the first changes and the intention of setting up a working party, including representatives of the staff, to look into further measures and in particular to review the number of points that examiners were to be awarded for PCT applications. The significance of the points system is that an examiner's output, which matters in the periodic appraisal of his performance, is

* The terms are explained in A above.

determined according to the number of points earned. The Administration believed that the points should be reduced from 1 to 0.75 for a PCT application and to 0.55 for a Euro-PCT one. In its report dated 27 November 1992 the working party, or "group", made further suggestions for "streamlining the procedure" but none for any change in the points system.

4. At a meeting with the Administration in mid-December 1992 the staff representatives expressed the wish that the EPO offset any reduction in points for applications by the grant of more points for other areas of work; alternatively, it could keep the same number of points as before by way of incentive to higher output. The upshot was that the management of DG2 agreed to hold over until February 1993 any change in the number of points awarded so as to allow time for principal directors to hold meetings with the staff. Such meetings took place in January 1993. But on 26 January the Vice-President issued the note referred to in 1 above, thereby provoking internal appeals from the complainant and many other examiners. The Appeals Committee was divided. In its report dated 1 June 1994 the majority recommended allowing the appeals and the minority rejecting them. The President followed the minority and announced rejection in a communiqué dated 22 July 1994 which was published in the EPO Gazette in English on 1 August and in French and German on 29 August 1994. That is the decision impugned.

Receivability

5. The Organisation raises the preliminary objection that the complaint is irreceivable because the complainant has no cause of action: since her staff report for 1992-93 gave her a "very good" general rating she has suffered no detriment as a result of the decision she is challenging. Her answer is that the total number of points that an examiner has to earn to warrant such a rating has never been reduced; so the EPO's unilateral decision to award fewer points for processing the same number of applications means that the examiner must work harder and longer to achieve the same rating as before.

6. Although the Organisation observes that the examination is not the same after "streamlining" as it was before, the complainant is right. The decision to reduce the number of points does not apply just to the year 1992-93 but holds good and so continues to affect the complainant's interests. She has a cause of action in that the reduction will continue to have a bearing on the determination of her general ratings in performance reports. Her complaint is therefore receivable.

The merits

7. The complainant argues that the note of 26 January 1993 was issued without previous consultation of the General Advisory Committee or of any Local Advisory Committee and that that constituted a breach of the EPO's obligation under Article 38 of the Service Regulations, of which (3) and (4) read as follows:

"(3) The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36.

(4) Each Local Advisory Committee shall be responsible for giving opinions on:

- any proposal to make rules and, in general, except in cases of obvious urgency, any proposal which concerns solely the whole or part of the staff at the place of employment concerned;

- any question of a local nature submitted to it by the President of the Office or his representative;

- any question submitted to it for an opinion by the General Advisory Committee;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

In the complainant's submission the reduction in points adversely affected many examiners and amounted to substantive alteration of their working conditions in that their failure to meet the requirements of higher output would earn them a lower rating in staff reports and so have adverse effects on pay, on

prospects of promotion and on pension entitlements. The measure was therefore one which - to quote Article 38(3) - "concerns the whole or part of the staff to whom these Service Regulations apply".

8. The Organisation's reply is that the Vice-President in charge of DG2 did hold consultations on the subject with staff representatives at meetings on 12 June, 25 September, 13 November and 17 December 1992; that the proposal to reduce the number of points was mentioned as early as June 1992; and that the staff were represented on the working party that held some ten meetings to discuss the topic and reported on 27 November 1992. In the Organisation's submission the staff knew the Vice-President's intention full well before they saw the note of 26 January 1992. There was, it maintains, no breach of Article 38 because the decision came under the prerogatives of the President, who is responsible for the sound management of the Office as a whole: decisions of that kind that merely affect the way in which the Organisation's tasks are to be carried out do not fall within the scope of Article 38(3). Its interpretation of that provision is that consultation of the General Advisory Committee is required only where a decision affects the legal situation of staff as laid down in the Service Regulations or Pension Scheme Regulations. It concludes by observing that since the processing of applications had been improved it was only reasonable and indeed inevitable that the number of points to be awarded should be reduced accordingly.

9. The construction that the Organisation puts on Article 38(3) is too narrow. Article 38(3) does of course, as the EPO says, apply to cases where the Service Regulations and Pension Scheme Regulations are to be amended or "implementing rules" are to be made, and the legal status of staff is thereby to be affected. But it goes further: it applies to cases where "any proposal" is made "which concerns the whole or part of the staff". So it casts a wide net that goes beyond mere changes in legal provisions.

10. Article 38(3) does not interfere with the President's exercise of his decision-making authority, but seeks to ensure that the proposal shall go through a formal process in which the staff have a right to be consulted through the General Advisory Committee. Indeed it makes for good relations between staff and administration not just to empower but to require that body, set up under the Service Regulations to represent both sides, to give "a reasoned opinion". It does not matter that management may have consulted the staff on the subject in other ways. What was lacking in this case was what Article 38(3) required: the formal consultation of the General Advisory Committee and the submission of its reasoned opinion before the decision was made.

11. The Organisation pleads that staff representatives were closely involved in the decision-making process and had ample time in which to make suggestions in accordance with Article 36(1) a) of the Service Regulations, which says that the Central Committee of the Staff Committee "shall be responsible for ... making, at the request of the President of the Office or on its own initiative, suggestions relating to the organisation and working of departments or the collective interests of the whole or part of the staff". That is beside the point. The powers and duties of the General Advisory Committee under Article 38 are quite independent of those of the Central Committee under Article 36.

12. The conclusion is that the impugned decision was made in breach of the rules and must be set aside: the system of points that was in force before holds good. Although the Tribunal will not, as the complainant has asked, make any order that specifically refers to other members of staff, she is entitled to have the figures of her own output corrected in line with that system and her staff report for 1992-93 altered accordingly.

13. Since her complaint largely succeeds, she is entitled to an award of costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall correct the figures relating to the complainant's output in accordance with the system of points as in force before that decision took effect.

3. It shall alter her staff report for 1992-93 accordingly.

4. It shall pay her 2,500 German marks in costs.

5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re KOSTER — Judgment 1489

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain Koster against the European Patent Organisation (EPO) on 3 November 1994 and corrected on 31 December, the EPO's reply of 24 March 1995, the complainant's rejoinder of 30 May and the Organisation's surrejoinder of 29 June 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1964, joined the staff of the European Patent Office, the secretariat of the EPO, on 1 December 1986 as a clerk at grade B2 in the Documentation Service of its Sub-office in Berlin. In September 1988 he had an accident, and the treatment of his injuries included two operations on a shoulder. The Pension Office of Berlin later declared the degree of his invalidity to be 30 per cent because of stiffness in the shoulder, degenerative spinal lesions and high blood pressure.

Over the next few years his relations with his supervisor, the head of the Documentation Service, grew steadily worse. The head of the Service found fault in particular with his low output and many absences. A staff report dated 19 June 1992 on his performance in 1990-91 gave him a general rating of only 4 ("adequate"). On 25 August 1992 he entered comments on the report but in final comments dated 4 December 1992 the reporting officer confirmed the earlier reservations about his fitness for work. The Principal Director of the Sub-office, who was the countersigning officer, asked the EPO's medical officer how far the accident might have affected performance. On 30 December 1992 he raised the rating to 3 ("good") and

asked the reporting officer to amend his comments of 4 December. That officer did so on 1 July 1993.

On 2 March 1993 the complainant had started what is called the "C4" procedure for conciliation about his report. He also sent the President of the Office a letter in German, headed "Appeal against the behaviour of the head of the Documentation Service", in which he alleged injury under several heads and described his supervisor's comments of 4 December 1992 as unwarranted. He claimed damages from the Office and an apology from his supervisor.

By a letter of 22 March 1993 the Director of Staff Policy told the complainant that the President of the Office had provisionally rejected his appeal and put his case to the Appeals Committee. In its report of 4 July 1994 the Committee recommended rejecting his appeal on the grounds that it was not challenging any decision and was therefore irreceivable. By a letter of 2 August 1994, the impugned decision, the Director told him that on the Committee's recommendation the President had rejected his appeal.

B. The complainant submits that the Appeals Committee was mistaken in treating his internal appeal as irreceivable. The word "Beschwerde", which he used in his letter of 2 March 1993, may have been confusing because it can mean both "grievance" and "appeal". But that letter was not an appeal under Article 107(2) of the Service Regulations: its sole purport was to ask the President to have his supervisor behave differently. The true purpose of his complaint is to appeal against the letter of 22 March 1993 refusing those claims, and that letter did notify an adverse individual decision.

He says he was free to file an internal appeal outside the context of the procedure for conciliation about his staff report for 1990-91. That procedure does not amount to an appeal under Articles 106 to 109 of the Service Regulations or even internal means of redress within the meaning of Article VII(1) of the Tribunal's Statute.

He wants the Tribunal to award him 30,000 German marks in damages for his supervisor's behaviour and for the Organisation's failure to take prompt remedial action; order the President of the Office to take action within two months of the date of judgment to protect him from harmful treatment by his supervisor, subject to the payment of a penalty of 2,000 marks a month for any delay in the performance of the obligation; and award him 5,000 marks in costs.

C. In its reply the EPO challenges the receivability of his internal appeal and so also of the complaint. In its

submission he may not dodge the issue by saying he never lodged an internal appeal. His letter of 2 March 1993 did amount to an appeal against his supervisor's behaviour and comments, since in it he used several times the word "Beschwerde", the term that the German version of the Service Regulations applies to an internal appeal. That such was his intent was plain from the comments, also dated 2 March, which he appended to his staff report. Besides, in his letter of 22 March 1993 the Director of Staff Policy confirmed that the case was going to the Appeals Committee. He was not free to lodge an appeal against the reporting officer's comments in the staff report inasmuch as they formed part of that report and were not a separate challengeable decision. On 2 March, the day on which he lodged his internal appeal, he applied for the "C4" procedure. Since the report was not final until that procedure had been completed it could not form the subject of an appeal.

In subsidiary argument on the merits the EPO observes that as countersigning officer the Principal Director of the Sub-office gave the complainant satisfaction by raising his rating from 4 to 3. So after the removal on 1 July 1993 of the unfavourable comments the report no longer caused him any injury.

D. In his rejoinder the complainant points out that his appeal of 2 March 1993 was not about the staff report but about the injury his supervisor's behaviour had caused him, a matter that went far beyond the C4 procedure. Though his letter of 2 March 1993 alluded to the comments by the head of the Service it referred to other forms of injury as well. Likewise, his own remarks on his staff report came under the reporting procedure and fell outside the context of an appeal. Besides, it was not until 6 April 1995, after the President had endorsed the staff report, that he filed the internal appeal against that report.

E. In its surrejoinder the EPO contends that the appeal did concern comments in the staff report and that it was only after 9 January 1995, when the President endorsed the report, that it became appealable.

CONSIDERATIONS:

1. The complainant joined the EPO's Sub-office in Berlin in 1986. He is seeking redress for injury which he says he suffered on account of his supervisor's behaviour and the Organisation's failure to take reasonably prompt remedial action.

2. There were incidents in 1992 over the appraisal of his services in 1990-91, and his supervisor, the head of the Documentation Service, made criticisms about his performance, attendance and time-keeping. The complainant wrote the President of the Office a letter on 2 March 1993 in which he referred to his difficulties at work. In his letter he spoke of an accident that had left him disabled; he accused his supervisor of lack of understanding and mistrust; and he objected to the use of information about his private life that in his view was calculated to discredit him. He concluded:

> "Because of constant harassment at work I am suffering from psychosomatic disorders and high blood pressure, and I am claiming proper financial compensation.
>
> I also want the EPO to order [my supervisor] to apologise for his behaviour, to treat me with proper respect and to stop harassing me."

3. After preliminary consideration the President decided on 22 March 1993 not to allow his claims and referred them to the Appeals Committee for report. The Committee did not meet until 4 July 1994. It then declared the appeal irreceivable on the grounds that the complainant was not challenging any individual decision; that "the behaviour of an immediate superior is not a decision against which an appeal may be filed"; and that he could not expect assistance from the Office under Article 28 of the Service Regulations since the purpose of that provision "is not to settle a dispute that has arisen within the Organisation itself". By a decision of 2 August 1994, the one impugned, the Director of Staff Policy told the complainant that the President had decided to endorse the Committee's recommendation and reject his appeal.

4. The EPO submits that the Committee and the President were right to treat the complainant's appeal as irreceivable because he was not challenging any adverse individual decision, and that because that appeal was irreceivable so is the present complaint.

5. The plea fails. The complainant did misstate his case in heading it "Appeal against the behaviour of the head of the Documentation Service". But what he wanted from the President was two decisions: an award of damages for the injury he said he had sustained, and action by the President to deal with the head of the Service. There is no doubt that his claims were rejected, if only in the reply of 22 March 1993. And it is that reply, which does amount to an adverse decision, that he says he is challenging in his pleadings on the complaint.

6. As the EPO points out, the complainant's criticisms of the reporting officer's remarks cannot be distinguished from his objections to the appraisal report itself, which is covered by a different procedure. But the complainant is at pains to show that his purpose is not to challenge that report as such but to get redress for the injury which he attributes to his supervisor's behaviour and which in his view includes the appraisal of his performance.

7. The complaint challenges the President's refusal to grant him such redress, and for the above reasons it is receivable. But for the reasons that are set out below it is devoid of merit.

8. The complainant submits that his supervisor has been victimising him since late 1989, refusing to take account of his disability and poor health, constantly making unwarranted charges and allegations about his work and private life, and blocking his many applications for transfer. The Organisation, he says, has done nothing to help, and he has suffered moral injury, including damage to his good name; physical injury; and injury to his prospects of promotion. He says the Organisation owes him redress because it is liable for any mistreatment of its staff by a supervisor; because it owes its staff a duty of protection and care under the Service Regulations; and because it is guilty of gross negligence in failing to solve a problem that goes back five years, to transfer him to a more suitable job, to ensure that the appraisal of his performance makes allowance for his poor health and to require his supervisor to apologise and behave properly towards him.

9. His arguments cannot be sustained. The first point is that he may not rely on Article 28 of the Service Regulations. That article does entitle officials to protection against attacks related to their status or duties and to compensation for injury. But, as was said in Judgment 1270 (in re Errani No. 2) and as the Appeals Committee also observed, its purpose is not to settle a dispute that has arisen within the Organisation itself. So it affords no basis for a claim to help from the Organisation against treatment by a supervisor.

10. Secondly, the President's refusal to order the complainant's supervisor to offer him an apology cannot in the circumstances of the case be deemed to constitute an actionable wrong.

11. And there is a third point. The Organisation is no doubt liable for any mismanagement and for any mistake its staff may commit and must offer redress to anyone who suffers thereby. But the Tribunal is satisfied on the evidence that

the complainant's objections are in substance devoid of merit. To be sure, he did not get on well with his supervisor, and transfer would probably have been in everyone's interest. Yet there is no proven act of mismanagement. Though the EPO had him promptly examined by its medical officer, there was nothing about the state of his health that was thought to keep him from carrying out his duties. The procedure for review of his staff report was properly followed. And the reasons why the EPO rejected his applications for transfer are not questionable on the evidence before the Tribunal. Nor is there any evidence of improper delay in his advancement. On that score it is worth citing the EPO's surrejoinder, which says that his supervisors "consistently stress his potential", "are urging him to fulfil it" and want him to "attain a higher grade as soon as he qualifies for promotion".

12. The conclusion is that the wrongs he imputes to the Organisation and the injury he alleges are not proved. The Tribunal will not interfere in management by ordering the Organisation to transfer the complainant or to replace his reporting officer. Besides, his claims on those counts are irreceivable because he did not make them part of his internal appeal. So his complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re LANGELEZ (No. 3) Judgment 1490

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 9 June 1993 and corrected on 1 October, CERN's reply of 3 December 1993 and the complainant's waiver of his right to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 9(2) of its Rules;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts with some bearing on this case appear under A in Judgments 1104 and 1172 on the complainant's first two complaints.

In its report of 7 January 1991 the Joint Advisory Rehabilitation and Disability Board of CERN concluded that the complainant's ailments were not service-incurred and that the job CERN had offered him was acceptable.

By a letter of 15 January 1991 the Director-General informed him that he endorsed the Board's recommendations and was putting him on a post of mechanic in category 4, though he might keep the higher category, 3, in propria persona. From September 1991 to July 1993 he was on secondment to the Administrative Support (AS) Division. Since July 1993 he has been a records clerk, still in category 4, in the SL Division.

On 1 August 1991 CERN brought in a new scheme for advancement by which the staff were to follow "career paths", each comprising grades and steps. In a letter of 14 February 1992 the Leader of the Personnel Division told the complainant that he was put on path III.

On 24 April 1992 he lodged an internal appeal asking to be put on path IV, which is higher than III. In its report of 5 January 1993 the Joint Advisory Appeals Board found nothing wrong with putting him on path III and by a letter dated 3 March 1993, one of the two impugned decisions, the Director-General upheld his earlier decision.

On 20 August 1992 the complainant had filed another appeal with the Director-General objecting to the rota system of work that CERN had introduced in 1983.* In two letters of 19 and 20 October 1992 the Director of Administration answered that the case was "closed" and there was therefore no reason to convene the Appeals Board. On 19 December 1992 he wrote again to the Director-General. The Director of Administration replied in the same vein on 5 February 1993. The complainant sent the Director-General another letter on 9 April 1993. The Director-General confirmed on 4 May 1993 that his appeals were irreceivable and that is the second decision he is challenging.

B. The complainant pleads the Director-General's decision of 15 January 1991 to let him keep occupational category 3 in propria persona. In his submission the rules mean that anyone in that category should go on career path IV. So he was discriminated against.

He has never had any description or grading of the post and duties he has held since September 1991, when he was seconded to the AS Division. That, he says, has precluded tending his own interests properly.

He dwells at length on the dispute about the rota system that began in 1983.

He accuses CERN of "victimising" him as a staff representative.

He wants CERN to clear up his situation, put him on path IV and pay him damages for all the injury he has sustained since October 1984. He seeks costs.

C. CERN replies that the letter of 4 May 1993 contains no decision that the complainant may challenge before the Tribunal

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* For a description of the system see Judgment 1104 under A.

but merely explains or repeats the Organization's stand. Since there is no link between the two impugned decisions he may not challenge them both in a single complaint. And his claim to damages for injury sustained since 1984 is too vague to be receivable.

On the merits CERN explains the principles underlying its new system of advancement and submits that it has complied with the rules. It put the complainant in the occupational category that corresponded to his official duties. The Director-General's decision to let him stay in category 3 in propria persona afforded no guarantee that he would make a career in that category.

The Organization denies treating him unfairly or refusing him a post description.

His objections to the rota system are out of time.

CONSIDERATIONS:

1. The complainant joined CERN in 1970 as a mechanic at grade 5. He sometimes had to do shift work. In 1976 the Organization promoted him to grade 6 and made him an operator of particle-accelerators.

2. From 1987 the state of his health made shift work difficult and in a decision of 3 October 1988 the Director-General declared him unfit for his job. He appealed without success against that decision. There was a medical examination and the Joint Advisory Rehabilitation and Disability Board made a recommendation. By a decision of 15 January 1991 the Director-General upheld his earlier decision, put him on a post for a mechanic and, though the post was in category 4, let him keep category 3, that of his previous post, in propria persona.

3. At first he was in the SL Division. Then, from 1 September 1991, he was seconded to the AS Division to help in setting up a computer system in the library. The secondment ended on 30 July 1993. While on secondment he, like everyone else on the staff, was put on a career path in line with a new scheme for advancement. By a decision notified on 14 February 1992 he was put on path III as from 1 March 1992.

4. The complainant wants the Tribunal to quash the Director-General's decision of 3 March 1993 rejecting his internal appeal against being put on path III. He further impugns a letter dated 4 May 1993 declaring irreceivable his

many appeals against decisions taken in 1988 on his fitness for shift work and in 1991 on his reclassification. He also wants other decisions quashed and seeks awards of damages and even the review of judgments on his earlier complaints.

5. His main objections are to the decision to put him on path III. As was said in Judgment 1412 (in re Audria), the new system of advancement entails putting staff on career paths that correspond to their main duties. Advancement along each path depends on yearly assessment of performance. To begin with each staff member got a provisional assignment to a career path that took account of "category" and other criteria. There followed a complex procedure and eventually, after making sure that the provisional assignment matched duties and "potential" and that there had been no discriminatory treatment, the Director-General took a final decision on the staff member's career path.

6. In support of his claim to path IV the complainant says that the Organization acted in breach of the rules it had itself set in instructions it issued on 3 October 1991. He pleads breach of equal treatment and says that CERN's unlawful processing of his case since 1984 has adversely affected the decision on his career path.

7. His plea of breach of the instructions fails. They said that someone in category 4 and at grade 6 would provisionally go on path III. Since reclassification in 1991 the complainant's duties had been in category 4 and his post in grade 6.

8. Relying on the Director-General's assurance in 1991 that he would keep category 3 in propria persona, he says he was entitled to provisional assignment to path IV under point 14 of the instructions. But he is thereby misreading them. What they said was that the criteria for determining career paths were to be "the staff member's present classification and level of function together with his/her potential". The Director-General's purpose in letting him stay in category 3 was to save him from losing the title of technician. But he acquired thereby no right to perform duties in category 3 or demand a career proper to someone who was actually performing such duties. All that mattered in determining his career path was his actual duties. On that score he makes out that CERN has given him no proper post description since 1991. But the evidence is that it did: it appended to the text of its decision of 15 January 1991 a description of his duties as mechanic and it set out in communications of 13 December 1991 and 3 September 1993 descriptions of the duties he was to have

while on secondment to the AS Division. He may have been "on trial" in AS, but that has no bearing on the correctness of the decision about his career path.

9. Lastly, there was neither any obvious misreading of the evidence nor any breach of the Organization's own rules in the final decision to put him on path III. That is plain from the nature of his actual duties, which correspond to the definition of that path as covering "fully qualified craft or office work involving a variety of problems of execution; or responsibility for specialised work units".

10. His plea of discriminatory treatment cannot be sustained either. His situation is not comparable to that of operators in category 3: the whole point of the transfer of 1991 was to take him off work as an operator of accelerators.

11. In support of his case against putting him on path III the complainant may be objecting to earlier decisions such as the one of 15 January 1991. But, as was held in Judgment 1412, cited above, a staff member may not, in the context of a challenge to the choice of career path, object to earlier incidents in his career. So the plea must fail and with it the claim to the quashing of the Director-General's decision of 3 March 1993.

12. CERN pleads that his challenge to the Director-General's letter of 4 May 1993 is irreceivable because, for one thing, it contains no decision and, for another, a single appeal may not lie against two unconnected decisions. Without taking up the second objection the Tribunal observes that in reply to one of the complainant's many letters the Director-General refused to reconsider matters on which he had taken a final decision. He thereby acted unimpeachably. What the complainant is trying to do is challenge the decisions that were taken on 3 October 1988 and 15 January 1991 and that have become final. In the absence of any new fact he may not challenge mere confirmation of those decisions.

13. Nor is his application for review of Judgments 1104 and 1172 receivable. Besides, the only grounds he offers are cryptic allusions to "new facts" and "mismanagement".

14. For the foregoing reasons his further claims must also fail: to damages for the various forms of injury he imputes to mismanagement of his career; to the disclosure of evidence; to recognition of his ailments as service-incurred; to the ordering of a medical enquiry; and to back payments against loss of salary, of which he affords no particulars.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re AUGIER and GARDETTE

Judgment 1491

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Régine Andrée Marie Augier and Mr. Yves René Gardette against the European Organization for Nuclear Research (CERN) on 27 September 1993 and corrected on 16 June 1994, CERN's replies of 14 October 1994, the complainants' single rejoinder of 24 February 1995 and the Organization's surrejoinder of 22 May 1995;

Considering the applications to intervene filed by Mr. Michel Bonnet on 27 January 1995 and Mr. Pierre Loridon on 9 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. CERN has its headquarters in Geneva and since being established in 1953 has had premises in Switzerland. In 1965 it extended them across the border into France. On 13 September 1965 it concluded an agreement with France about its status. According to Article XIV.2 of the agreement, as revised on 16 June 1972, the French Government is not bound to grant to French citizens and to permanent residents in France the exemption from taxation that CERN officials enjoy under Article XIV.1(a).

To determine the applicable rates of income tax the French inland revenue follow what is known as the method of the "effective rate" and take the figure of the taxpayer's aggregate income. For the international civil servant that means combining pay and, if any, private income and, since the rates of tax are progressive, applying a higher rate to the private income.

In keeping with Regulation R IV 2.02 of the CERN Staff Regulations and with the "effective rate" rule, CERN pays back to its employee any tax directly levied on pay and allowances, but in the last resort France bears the costs. What happens in practice is that the French inland revenue report directly to the Organization the amount due from each staff member in tax on CERN income; CERN makes the amounts over, and the French thereupon return them. The staff member pays the part of the tax levied on any private income.

Mrs. Augier, a French citizen, joined CERN on 1 February 1970 as a clerk. She held a fixed-term appointment that was regularly renewed until 1 February 1976, when she got an indefinite one. Mr. Gardette, who is also French, started at CERN as an administrative officer on 16 February 1974. After several fixed-term appointments he was granted an indefinite one on 16 February 1980. Both the complainants are resident in France.

Mrs. Augier wrote on 24 March 1993 and Mr. Gardette on the 25th to the Leader of the Personnel Division claiming refund of the tax they said they had overpaid in 1990 and 1991 because the French inland revenue had counted their earnings from CERN in determining the rate to be applied to their private income. They pleaded breach of the principle of equal treatment for French and other CERN staff living in France. They cited the case of an Italian employee of CERN resident in France who in 1990 had won an appeal to the French inland revenue against the counting of his international earnings in determining the rate of tax on his private income and had got tax relief. They also argued that the system amounted to indirect taxation of their earnings from CERN.

In letters of 8 April 1993 the Leader of the Personnel Division replied that it was on the strength of figures supplied by the French inland revenue that CERN paid back the tax levied on international earnings; it had no authority to determine the amount of national tax; the only matter at issue was the taxation of private income; and the claims to reimbursement therefore failed.

On 7 June 1993 the complainants addressed to the Director-General requests for review of the Leader of Personnel's decision of 8 April and sought leave to go straight to the Tribunal. By letters of 30 June - the impugned decisions - the Director-General answered that he would not review the Leader of Personnel's decision but gave them leave to appeal directly to the Tribunal.

B. In the complainants' submission the dispute has arisen over CERN's failure to abide by the material rules and by the principle of equal treatment for all members of its staff. It may not eschew liability by pleading French law and its own lack of authority to set tax rates.

On the merits the complainants plead breach of R IV 2.02. According to that provision and the rule of exemption from tax on international earnings, pay and allowances from CERN should not incur any national tax. But what actually happens is that their earnings from CERN count in determining the rate of tax to be applied to their private income and so are being taxed indirectly. Though R IV 2.02 does require CERN to refund the tax according to the "effective rate" rule, it should not apply, say the complainants, to them. For one thing, there is no allusion to the rule in the English version of R IV 2.02; for another, the Finance Committee of CERN has never approved it, as Rule I 1.04 requires.

Their second plea is breach of the precept, which the Tribunal has enforced on more than one occasion, that an organisation must put all its staff on a par. For a staff member who is living in France, but is not French, earnings from CERN do not count in determining the rate of tax to be applied to any private income. So the French citizen living in France is at a disadvantage. Yet the whole point of exemption from tax is to make for equality between members of the staff.

The complainants ask the Tribunal to set aside the decisions of 30 June 1993 and order CERN to refund to them the sums they overpaid in tax in 1990 and 1991: 24,552 French francs for Mrs. Augier and 7,733 for Mr. Gardette. They seek costs.

C. CERN replies that the complainants have no case. It paid France the amounts of tax levied on their earnings and discharged its obligation under Regulation R IV 2.02 to refund those amounts to its staff. French staff living in France are not exempt from tax on their earnings from the Organization and are mistaken in relying on some rule of exemption to impute to it breach of Regulations R IV 2.01 and 2.02.

In any event the methods of taxation that member States may apply are no business of CERN's. And whatever the effect of French tax law may be lies with its author. So the complainants' quarrel is not with CERN, but with the French. Their charge of discrimination is likewise unsound: French law alone lays down the tax liabilities of the French and the other CERN staff living in France. Besides, the two groups are not in like case in law, only the staff of other nationalities being exempt from tax on their CERN earnings. Equal treatment holds good only where staff are in the same position in fact and in law; so there is no breach of the principle even in French law.

D. In their rejoinder the complainants enlarge on their pleas, maintaining that the rule whereby CERN refunds the tax levied by France is based on the principle of exemption for the earnings of international officials. CERN is paying mere lip service to that principle if it acquiesces in the counting of CERN earnings for the purpose of setting the rate for taxable income. In a ruling of 16 December 1960 (in re Humblet) the Court of Justice of the European Communities held that to apply to staff of the Communities employed in Belgium a rule of Belgian tax law that was comparable to the "effective rate" rule was tantamount to indirect taxation of their earnings as such staff and was contrary to the law of the Communities. And in a memorandum of 16 October 1969 the office of the Legal Counsel of the United Nations expressed the view that a State that was party to the United Nations Convention on Privileges and Immunities might not reckon the amount of international earnings in working out the rate of tax on private income.

E. In its surrejoinder CERN insists that it did observe the rules and has no authority to check or alter methods of levying national tax. In its submission the ruling by the European Court and the opinion of the Legal Counsel of the United Nations are neither here nor there.

CONSIDERATIONS:

1. The complainants are employees of CERN and French citizens living in France. The Leader of the Personnel Division of CERN refused to refund to them part of the taxes that the French inland revenue had levied on their income. On 30 June 1993 the Director-General upheld that refusal in decisions that they are now impugning. Since the complaints raise the same issues they are joined to form the subject of a single ruling.

2. The Director-General granted the complainants leave not to appeal to the Joint Advisory Appeals Board and they have come straight to the Tribunal. Their complaints are therefore receivable.

3. The salient facts are that, though CERN's headquarters are in Geneva, it has premises in France as well. Under an agreement that the Organization has concluded with France its staff are exempt from any direct levy by that country of tax on CERN pay and allowances. French citizens who are resident in France are not so exempt: they must declare their full income to the French inland revenue and pay tax thereon in accordance with French law. But they recover any

tax levied on their CERN earnings on the strength of Regulation R IV 2.02 of the CERN Staff Regulations, which says:

> "Compulsory taxes levied directly on remuneration and benefits received from the Organization shall be reimbursed on production of proof of payment, provided that the member of the personnel concerned has informed the Director-General of a receipt for a demand for such taxes."

The practice is for the French inland revenue to report directly to CERN the amounts of tax that French citizens must pay on earnings from the Organization, the relevant text being headed "Refund to CERN staff resident in France of taxes levied on international earnings". Tax on any income from other sources is of course not refundable.

4. The complainants have their earnings from CERN and draw income from other sources as well. They have been recovering the amounts of tax reported by the French inland revenue as levied on their international earnings, but they are challenging the manner of reckoning. Since rates of income tax in France are progressive the effect of counting earnings from CERN in their total income is to put the rest of their income in higher tax brackets. By their reckoning the Organization should therefore have paid them back also further amounts they had to pay in taxes for 1990 and 1991, the figures being 24,552 French francs for Mrs. Augier and 7,733 for Mr. Gardette. The Leader of the Personnel Division rejected their claims on the grounds that CERN had no authority to set the rates of tax on their private income, that such income was none of its concern, and that in such circumstances it merely acted on the figures supplied by the French inland revenue.

5. The complainants' case boils down to two pleas. One is that the impugned decisions offend against Regulations R IV 2.01 and 2.02; and 2.02 is partly unlawful anyway because the French text prescribes reimbursement "according to the rule of the effective rate". Their second plea is breach of the rule that an international organisation must put all its staff on a par.

6. Their first plea fails. CERN has but one obligation under R IV 2.02: to refund taxes paid by officials "on remuneration and benefits received from the Organization". It has no way of checking the rates of tax that France may apply to such sums in the exercise of its sovereign authority. It is true that the French approach does not fully discount earnings from CERN for the purposes of taxation since they count towards the figure of total taxable income. But CERN is not to blame for the resulting increase in the rates of taxation of the complainants' total income. All it can do is pay back to

French citizens on its staff the amounts they have paid in tax on their international earnings: it exerts control neither over the tax brackets and rates set by French law, nor over the method of reckoning their total income, which is just a feature of the French manner of processing income tax.

7. The complainants question under this head the lawfulness of R IV 2.02, which says that refunds must be made according to the rule of the "effective rate", and it may be a pity that CERN offers no explanation on that score. But the issue is immaterial. Whether the provision is lawful or not, the rules on the rates and reckoning of tax in France fall outside the ambit of CERN's competence.

8. The complainants' second plea - that they fare less well than CERN staff who are not French - must fail too. The rule against discrimination is a cardinal one and borne out by a long line of precedent: see for example Judgment 1182 (in re Mirmand). But, as was explained in Judgment 1189 (in re Pinto de Magalhaes No. 3), it holds good only where staff who are in like case both in law and in fact have not been treated alike. Under CERN's agreement with France its staff are exempt in that country from direct taxation on their earnings from the Organization. But the provision does not apply to French citizens, who do not enjoy exemption from tax on their earnings from CERN and are therefore, by reason of the terms of an agreement that CERN is bound by, not in the same position in law as staff of other nationalities. As to earnings from CERN, such staff are exempt from all tax, whereas CERN employees who are French citizens are entitled to repayment of tax actually paid. As to other income, the staff who are not French do fare better because only their other income counts for the purpose of reckoning rates of income tax and it therefore falls within lower tax brackets, whereas for the French citizens the whole of their income counts for that purpose. But the difference in treatment is not of the Organization's making: it is due solely to the working of French tax law.

9. Since the complainants' pleas are unsound their claims, including claims to costs, must fail.

10. Since the complaints fail, so too do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re PERKINS

Judgment 1492

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Francisca Perkins against the Pan American Health Organization (PAHO) on 25 January 1995 and corrected on 16 March, PAHO's reply of 29 May, the complainant's rejoinder of 7 July and the Organization's surrejoinder of 24 August 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Paraguayan who was born in 1943, began work at the PAHO in May 1992 as an employee of a temporary agency. She was assigned to the office and project equipment unit of the Procurement Department, headed by Mrs. Irene Pino.

On the recommendation of Mrs. Pino and Mrs. Marga Krupp, the complainant's first-level supervisor, the Chief of the Procurement Department, who was Mr. Anthony Asrilen, sent a memorandum to the Personnel Department on 16 November 1992 proposing the complainant for a vacant post of procurement clerk at grade G.4. She was chosen for the job and got a short-term appointment to it in December 1992, then a two-year appointment from 1 June 1993. In accordance with PAHO Staff Rule 420.4 the first year of her appointment was probationary.

In a memorandum of 26 August 1993 she asked Mr. Asrilen for a transfer to another unit in the Department on the grounds that she found Mrs. Krupp hard to get on with. In April 1994 she was transferred to the unit in charge of buying vaccines and drugs, which came under Mrs. Patricia Ramos.

On 12 May 1994 Mrs. Pino wrote a first probation report on the complainant's performance from 1 June 1993 to 1 June 1994. She gave her the rating "needs improvement" for all 13 "evaluation factors" and recommended extending the probation period by four months so that her work could be properly evaluated. On 13 May the complainant added her comments, objecting that the evaluation was "totally unfair". In his comments of the same date Mr. Asrilen said that the appraisal reflected the fact that "the staff member needs to be re-evaluated under a new immediate supervisor". By a memorandum of 25 May 1994 the Chief of Personnel told Mr. Asrilen that the complainant's within-grade salary increment was to be withheld for four months.

On 12 September 1994 Mrs. Ramos wrote a second probation report, covering the complainant's performance from 1 June to 30 September. She said that her "capabilities", being "limited", would be "an obstacle to her future development" in the Department, and rated her "unsatisfactory" for two evaluation factors, "satisfactory" for five, and "needs improvement" for the remaining six. She therefore recommended terminating her appointment on the grounds of unsatisfactory performance. On 15 September the complainant asked for a written explanation of the allegation that her "capabilities" were "limited". On 22 September, under the heading "review by second level supervisor", Mr. Asrilen stated that Mrs. Ramos' assessment bore out the earlier evaluation and observations, including his own. On 30 September the complainant signed the report, though she said she disagreed with the evaluation and was "still awaiting substantiation in writing" of Mrs. Ramos' comments.

By a letter of the same date the Chief of Personnel informed her that in view of the two probation reports her appointment would not be confirmed and that separation would take effect at 31 October 1994 to allow for the one month's notice required by Staff Rule 1060. In a letter of 14 October she appealed to the Director of PAHO against that decision and sought either confirmation of her appointment or a further extension of probation. By a letter of 27 October the Director upheld the decision to dismiss her and extended the period of notice to 30 November 1994. That is the decision she is challenging.

B. The complainant contends that the two probation reports were unsubstantiated and inconsistent. She alleges breach of Staff Rule 530.4, which says: "The evaluation of performance as reflected in these reports shall be the basis for assisting the staff member to make his most effective contribution ...

and for decisions concerning the staff member's status and retention" in the PAHO, and of Rule 540.2, according to which "the staff member shall be notified of the reasons" for the decision not to confirm his appointment at the end of the probationary period.

She cites Judgment 194 (in re Vrancheva), whereby the Tribunal quashed a decision to dismiss a staff member at the end of probation on the grounds that the organisation had produced no real evidence to substantiate the allegation that her work was unsatisfactory. She asserts that the criticisms of her work were not backed up by any specific challengeable allegations.

Mrs. Pino recommended extending probation so that her work could be assessed fairly, and that shows that the first evaluation was not a fair one. What is more, the recommendation was inconsistent with Mrs. Pino's endorsement of her application for the vacant post of clerk in November 1992. The second probation report made unsupported allegations about her performance.

She seeks reinstatement on a probationary appointment "of adequate length" and with "sufficient supervision" to permit fairer evaluation of her fitness for her duties. She seeks awards of moral damages and costs.

C. In its reply PAHO contends that the complainant's attitude was "defensive" or even "aggressive" and her work was "slow" and "inferior".

It points out that according to precedent the Tribunal exercises only limited review over a supervisor's assessment of a staff member. It submits that all the complainant's supervisors made "specific allegations" about her performance: they spoke of her constant mistakes, carelessness, inability to learn and unwillingness to take constructive criticism.

As Staff Rule 1070.1 required, the decision not to confirm her appointment was based on her unsatisfactory performance as evidenced by the two probation reports. And the Tribunal has consistently acknowledged an organisation's wide discretion in deciding whether to confirm a probationary appointment.

There was no breach of Rules 530.4 and 540.2. At every stage the complainant was told how to correct mistakes and was allowed ample time in which to do so. She knew that probation was being extended to give her a chance to show her mettle in another unit.

D. In her rejoinder the complainant pleads that since much of the work in the Procurement Department turns on points of detail the risk of error is high.

She contends that the first report offered only general criticism of her performance. As to the second one, it was the chief of the unit, Mrs. Ramos, who was supposed to tell her what to do; but she herself had joined the Department only four months earlier and was unable to give proper guidance.

The reason for the change in her supervisors' opinions of her work was that she got on badly with Mrs. Krupp, whom she calls "an abusive supervisor". Had her work been below par the PAHO would not have given her a short-term, let alone a fixed-term, appointment.

E. The Organization presses its pleas in its surrejoinder. It submits that work in the Procurement Department requires an eye for detail and that is just what the complainant lacked, as her frequent mistakes made plain. She offers not a jot of evidence to bear out her allegations about Mrs. Krupp.

CONSIDERATIONS:

1. The complainant, a citizen of Paraguay, joined the staff of the PAHO in 1992 under a short-term appointment. She was in the Procurement Department. From 1 June 1993 she was granted a fixed-term appointment as a clerk at grade G.4. In April 1994 she was transferred from the office and project equipment unit to the unit in charge of buying vaccines and drugs.

2. In accordance with PAHO Staff Rule 420.4 she was on probation in the first year of her appointment. During that period her immediate supervisors wrote two reports appraising her performance. The first, which covered the period from 1 June 1993 to 1 June 1994, called on her to do better in several respects and recommended extending the period of probation by four months. The probation was so extended, and at the end of the four months her supervisors wrote another report advising against confirmation of her appointment on the grounds of unsatisfactory performance. By a letter of 30 September 1994 the Chief of Personnel informed her that her appointment would end at 31 October 1994. She then appealed to the Director of the Organization. In a letter which he wrote to her on 27 October the Director rejected her appeal but said he was extending the period of notice by one month to 30 November 1994. That is the decision she is impugning.

3. Since both parties rely on precedent the Tribunal will restate the rules that emerge from the case law about probationary appointments. In Judgment 1052 (in re James) it held under 4:

> "... a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority.
>
> Although such criteria hold good for the review of all discretionary decisions, the Tribunal will exercise especial caution in reviewing a decision not to confirm the appointment of someone who is still on probation ..."

Judgment 1052 added that when the reason for non-renewal was unsatisfactory performance the Tribunal would not replace the organisation's assessment of the complainant's fitness for his duties with its own.

4. A long line of precedent bears out that approach. For example, Judgment 687 (in re Delangue) quashed a decision on the grounds that plainly mistaken conclusions had been drawn from the evidence, and Judgment 1017 (in re Hall) set aside the impugned decision because of a procedural flaw.

5. In this case the complainant is contending that the conclusions that the PAHO drew from the evidence were obviously wrong. In her submission the sole basis for the impugned decision is the two appraisal reports by her supervisors; that, being vague and inconsistent, they afford no grounds in law for dismissing her; and that the Director overlooked points in her favour such as Mrs. Pino's support for the application she made in 1992 for a vacant post of clerk.

6. The plea fails. For one thing, it was quite proper for the Director to rely on her supervisors' reports since they were best qualified to assess her; for another, it is plain from all the evidence, not just the reports, that her performance was below par. Several items that the PAHO appends to its reply show that while on probation she was inaccurate and careless and affidavits by her supervisors concur in finding her performance unsatisfactory.

7. Citing Judgment 194 (in re Vrancheva), the complainant further pleads that the PAHO did not state adequate reasons for its decision to dismiss her. That judgment set aside the impugned decision on the grounds that the defendant had failed to give the complainant in that case "clarification

of the specific facts motivating the unfavourable appraisal by the chief of her branch of the manner in which she carried out her duties". What the present complainant is saying is that the appraisals of her were in too general terms and contained no charges circumstantial enough for her to refute.

8. Again her argument is unsound. The 13 "evaluation factors" in the reports were specific enough for her to be able to grasp what was amiss. Besides, the grant of the further four months' probation on Mrs. Pino's recommendation left her ample time in which to make good. Yet by the end of that further period of probation she was rated satisfactory on only 5 of the 13 factors.

9. The Tribunal is satisfied on the strength of those reports and the other evidence that the termination of her appointment was a proper exercise of the Director's discretion and shows no fatal flaw.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mark Fernando Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
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EIGHTIETH SESSION

In re McLEAN (No. 2) Judgment 1491

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gregor McLean against the European Patent Organisation (EPO) on 17 March 1995, the EPO's reply of 2 June, the complainant's rejoinder of 6 August and the Organisation's surrejoinder of 11 September 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information relevant to this case appears under A in Judgment 1433 on the complainant's first complaint against the EPO, which employs him in Munich.

By a letter of 29 July 1994 the Director of Personnel Administration informed the complainant that the place where he might take his home leave was Sydney, in Australia. The letter confirmed that on taking such leave with his dependants he would recover in travel costs no more than half the price of business class tickets unless it proved impossible to buy them at that price on the "free market". He would also be allowed three days for the purpose of such travel.

In a letter of 10 August 1994 he asked the Director to review the terms of that letter "both as to reimbursement and as to the period of leave" and to treat his request, in the event of rejection, as an internal appeal. The Administration put his case to the Appeals Committee. In its report of 15 December 1994 the Committee recommended that the President should reject the appeal.

By a letter of 17 February 1995, which he impugns, the Director of Staff Policy informed him that the President had decided to endorse the Committee's recommendation.

B. The complainant submits that under the material provisions of the Service Regulations he was entitled to the full price of an airline ticket for travel in economy class to Sydney and back. He also cites two provisions about time allowed for travel which he says warrant setting at 14 the total number of days due to him for the purposes of taking home leave in Sydney.

He is claiming reimbursement of the costs of travel on a "tourist economy class air ticket both upon taking home leave and upon leaving the service" of the Organisation; recognition of his entitlement to the grant of 14 days for home leave; the reckoning of his travel costs "both upon taking home leave and upon leaving the service" in the same manner as for duty travel; and an award of 2,000 German marks in costs.

C. In its reply the Organisation points out that as to the travel expenses he will be entitled to "upon leaving the service" his claim is premature and irreceivable: who can say what the terms of refund will be by then? In any event the claim is devoid of merit inasmuch as the terms of reimbursement are not the same for one-way travel as for a return journey made for the purposes of home leave.

The EPO says that its practice has always been to refund only "the cheapest possible" airline tickets to be found on the market. When the Service Regulations came into force such tickets were for travel in "tourist economy class". Nowadays cheaper tickets are to be had. The Organisation also limits refund to expenses actually incurred, and they generally come to about half the cost of travel in business class. When actual expenses are higher it pays the difference.

As to the complainant's claim to the grant of 14 days for home leave, he is wrong to assume that the two rules he cites on travel time are cumulative in effect. They cover different cases: one applies where the time spent on travel depends solely on the distance; the other where stopovers, for example, prolong the journey.

D. In his rejoinder the complainant answers the Organisation's pleas and presses all his claims.

E. In its surrejoinder the EPO observes that the rejoinder offers no new arguments.

CONSIDERATIONS:

1. The complainant was born in Australia and holds both Australian and British passports. He took up duty at the EPO on 1 December 1991. In a form headed "Entitlement to home leave", which he signed on 28 April 1992, he stated that he wanted Harrow, in England, to be the place of his home leave. But in a letter of 23 March 1993 he asked a personnel officer of the EPO to have it changed to Sydney on the grounds that that was the place with which he had the closest ties, his wife was Australian, and her parents and his own lived in Australia. On 5 May 1994 he filed a claim to the refund of costs he had incurred for travel to Sydney and back on home leave for his wife and son in December 1992 and for himself in November 1993. On 6 May the EPO agreed to pay him the full amount, which came to 7,783.20 German marks. On 29 July 1994 it changed the place of his home leave to Sydney.

2. Before it had made that change he lodged his first complaint, on 23 June 1994, asking the Tribunal to have the form headed "Entitlement to home leave", which he had signed on 28 April 1992, corrected so that he could take home leave in Sydney. In his rejoinder on that complaint he argued that the decision of 29 July 1994 had not given him full satisfaction: it set conditions he believed to be at odds with the provisions of the Service Regulations about the amount he might claim by way of refund and the number of days he might take for the purposes of home leave.

3. In Judgment 1433 of 6 July 1995 the Tribunal held that the complainant had got satisfaction in the recognition on 29 July 1994 of his entitlement to take home leave in Sydney. It therefore decided that it need not rule on his claim about the place of his home leave, although it awarded him 500 German marks in costs. It declined to entertain the claims he made in his rejoinder about the refund of travel costs and the length of home leave both because they had not formed part of his original complaint and because on those counts internal appeals were still pending.

4. By a letter of 10 August 1994 he lodged an internal appeal objecting both to the amount he had got back in travel costs and to the number of days' leave he had been granted. In a second appeal dated 17 August 1994 he claimed the difference between the cost of three return airline tickets for travel in economy class from Munich to Sydney and back at the rates prevailing at the time when he and his wife and son had made the journey and the amount the EPO had actually refunded, which was 7,783.20 marks. The EPO passed his appeals to the Appeals Committee, which joined them and in a report of 15 December 1994 recommended rejection. In a letter of 17 February 1995

the Director of Staff Policy told him that the President had endorsed the Committee's recommendation. That is the decision he is impugning in this complaint, which he filed on 17 March 1995.

5. The first of the complainant's two main claims is about how much the EPO should pay to meet the cost of travel by himself and his wife and son to Sydney. He submits that under Articles 60(1), 77(2)(c), 77(3), 79 and 80(1)(c) and (d) of the Service Regulations he is entitled to the refund of the cost of an airline ticket in economy class for each traveller. Moreover, the EPO informed him in its letter of 29 July 1994 that he might not recover in travel costs more than half the price of business class tickets unless it proved impossible to buy tickets at that price on the "free market": he considers that to be an unlawful restriction on his entitlements under the Service Regulations.

6. The material provision is Article 77(3) of the Service Regulations, and it reads:

> "A permanent employee shall, on taking home leave as defined in Article 60 be entitled in accordance with the provisions of Article 80 to the reimbursement of travel expenses actually incurred for the outward and return journey between the place of employment and his home."

The term "expenses actually incurred" is plain: the employee may recover only such costs as he has already borne. The rule may not be the source of enrichment. Since the complainant and his wife and son were able to travel to Sydney on tickets that actually cost 7,783.20 marks, and since the EPO has paid that sum back to him, he may claim no greater amount.

7. The complainant's second main claim is about the length of home leave. Article 60 of the Service Regulations says that employees "shall receive eight working days' additional leave every two years to return home", and Rule 4(e) of circular 22 allows extra leave by way of compensation for travel time on home leave and contains two tables, one affording compensation for distance and the other related to the number of hours of the journey. Since the distance from Munich to Sydney was over 800 kilometres the first table entitled him to the grant of one-and-a-half days' extra leave, or three days for the journey there and back. And since the journey took more than twelve hours the other table also entitled him to the grant of three days' leave.

8. The complainant makes out that compensation is cumulative and so he is entitled to six days' extra leave. The EPO argues that the two tables are mutually exclusive.

9. The two tables in Rule 4(e) of circular 22 offer two possibilities: the official may choose whichever he prefers. For example, someone who takes home leave at a place 300 kilometres from Munich and goes by air will get an extra day's leave for the return journey according to the distance table, but none at all according to the other one. He will choose accordingly.

10. The complainant cites no precedent in favour of the cumulative grant of the time allowed according to both tables. The conclusion is that the tables are not to be construed as cumulative. That construction is in any event the more reasonable.

11. The complainant's claim about the costs of his travel "upon leaving the service" of the Organisation is, as the EPO points out, premature and therefore irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mark Fernando Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re MOSSU

Judgment 1494

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Claude Mossu against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 23 February 1995, OTIF's reply of 28 April and the letter of 16 May 1995 from the complainant's counsel informing the Tribunal that he would enter no rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss citizen who was born in 1936, was President of the Administrative Committee of OTIF from 1987 to 1989. At its 72nd Session, in November 1989, the Committee elected him Director General of the Central Office of International Carriage by Rail (OCTI), the secretariat of the Organisation. The Committee then discussed how long his term of office should be, the matter not being covered by the Convention on the Intergovernmental Organisation for International Carriage by Rail or by the Staff Regulations. It adopted the following declaration unanimously:

> "The Director General's term shall be five years. At least six months before expiry the Administrative Committee will decide by a vote of confidence whether to renew it. If the vote is favourable it will be renewed for five years."*

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* Registry's translation.

The complainant took up office as Director General on 1 January 1990. He got no letter of appointment saying how long his term would be.

At a meeting of the General Assembly of the Organisation on 20 December 1990 the member States adopted a protocol to the Convention. At the material time it had not yet come into effect. It added to Article 7.2(d) of the Convention a clause which said that the Director General and Deputy Director General were to be appointed for renewable five-year periods. On 1 January 1993 new Staff Regulations superseded the ones issued in 1980, and the provision of the Convention was incorporated in the first paragraph of Article 33.

The Administrative Committee noted at its 80th Session, on 10 and 11 November 1993, that the Director General's term would end at 31 December 1994 and unanimously decided to put the post up for competition for 1995-99. On 29 December 1993 the complainant wrote to the President of the Committee expressing surprise that it had not held a vote of confidence before putting the post up for competition. He asked for an explanation. By a letter of 28 January 1994 the President replied that, as he saw it, the explanation lay in the five-year limit which the Committee had set at its 72nd Session and which was now in Article 33, paragraph 1, of the Staff Regulations, and that the Committee's declaration at its 72nd Session had conferred on the complainant no right to the holding of a vote of confidence. The complainant told the Committee orally at its 81st Session in June 1994 that he would no longer be seeking renewal. He observed that though he had earlier asked the President for renewal the Committee had not seen fit to put the matter to a vote of confidence. He expressed the view that the rule, introduced at the Committee's 80th Session, about putting the post up for competition did not apply to himself.

From 5 September 1994 he was unfit for reasons of health to carry out his duties. The Committee issued an internal notice on 27 September, at its 82nd Session, stating that his appointment would expire at 31 December 1994 "without any need for further legal action by the Committee". By a letter of 20 October 1994 to the President of the Committee he claimed the right to sick leave after 31 December 1994 under Article 40(b) of the Staff Regulations, i.e. the right, for as long as he remained unfit, to full pay for nine months as from 5 September 1994 and to half pay for nine months thereafter. By a letter of 28 November 1994, the impugned decision, the President told the complainant that the Committee had turned down his request at its 82nd Session, on 8 and 9 November. In answer to an undated request from the complainant's son and by a letter of 19 December 1994, of which the complainant got a copy by fax the next day, the President gave him leave to appeal straight to the Tribunal.

B. The complainant submits that the sick leave provided for in the Staff Regulations affords insurance against loss of earnings in the event of illness and so entitlement to payment of his salary for as long as he remained unfit for duty. He relies on Judgment 938 (in re Hill No. 2): "a staff member cannot be separated while on sick leave". He says that the social protection a staff member enjoys goes beyond the end of his appointment.

He submits that in disregard of the case law OTIF failed to take a prior and separate decision not to renew his term. It thereby committed a mistake of law. It also failed to state the reasons for non-renewal.

He contends that the Organisation broke its own rules by not holding a vote of confidence in him before putting the post of Director General up for competition for 1995-99. It acted in breach of Article 31 of the Staff Regulations in their 1980 version by failing to send him a letter of appointment when he took up duty.

The complainant seeks the quashing of the decision to refuse him sick leave under Article 40(b) after 31 December 1994 and payment of salary thereafter for as long as he remained unfit for duty for reasons of health and up to the limits set in 40(b), plus interest at the rate of 5 per cent a year as from 1 January 1995. He asks the Tribunal to declare that OTIF made mistakes of law over the non-renewal of his appointment and claims awards of 200,000 Swiss francs plus interest at 5 per cent a year as from 1 January 1995, and of costs in an amount of 5,000 francs plus interest at the same rate and as from the same date.

C. In its reply OTIF maintains that the complainant's term expired at 31 December 1994. At the Administrative Committee's 72nd Session the two candidates still in the running, one of whom was the complainant, were told of its declaration limiting the Director General's term to a renewable period of five years. By deciding not to include such a provision in the 1993 Regulations the Committee refrained from confirming its original stance that it had to hold a vote of confidence.

An official who is put on sick leave gets full pay, then half pay, on the assumption that he is unfit for reasons of health to carry out his duties. As from 1 January 1995 the complainant was no longer Director General; so he was entitled to no pay anyway after 31 December 1994.

His objections to the non-renewal of his term are irreceivable because he has failed to exhaust the internal means of redress. He neither lodged an appeal with the Administrative Committee nor sought leave from the President to put that part

of the dispute straight to the Tribunal. In any event the claims are out of time.

In subsidiary argument the Organisation pleads that a fixed-term appointment confers no right to renewal unless the terms of appointment state otherwise. The Staff Regulations as in force at the date of the complainant's election confer no such right; nor does the declaration the Committee adopted at its 72nd Session. So the Committee had wide discretion in the matter and was entitled to put the post up for competition.

CONSIDERATIONS:

Receivability

1. According to Article VII, paragraph 1, of the Tribunal's Statute a complaint will be receivable only if the impugned decision is a final one and the complainant has exhausted all the means of internal redress available under the staff regulations. The staff regulations may, however, quite properly relieve the complainant of the obligation to go through the internal appeal procedure and let him come straight to the Tribunal. Article 58(1) of the Staff Regulations of OTIF, as in force since 1 January 1993, affords the right to appeal to the Administrative Committee. Article 59(1) grants staff the right to appeal to the Tribunal against a final decision taken at the close of the internal appeal provided for in 58(1). And Article 59(2) reads:

> "Notwithstanding the provisions of (1), a staff member may, with leave from the President of the Committee, forgo appeal under Article 58(1) and appeal directly to the Administrative Tribunal of the ILO."*

2. The present complainant has two quite separate claims. One is to payment of the equivalent of his salary in accordance with Article 40(b) of the Staff Regulations beyond the normal date of expiry of his appointment and for the duration of his illness. The other is to payment of 200,000 Swiss francs in damages for the non-renewal of his appointment and the Organisation's failure to comply with the rules on renewal. His application to the President of the Administrative Committee for leave to waive his right of internal appeal, and indeed the President's consent, covered only his first claim - to salary under 40(b) - which the Committee had refused. The waiver is to be construed as both

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* Registry's translation.

sides could and should reasonably have construed it in the context. The complainant's application and the leave from the President are limited in two respects. First, they relate to a quite specific claim to an amount readily worked out by the criteria in 40(b). Secondly, the cause of action arises under the Staff Regulations and the complainant rests his claim on his illness at the time of expiry of his appointment and on what he sees as the social purpose of the provision, not on the failure to renew his appointment. His other claim - to damages for being replaced as Director General - is not the same, either in the amount he claims, which is 200,000 Swiss francs, or in the cause of action, which is the moral injury and breach of duty he imputes to the Organisation. Nor is the second claim one that the parties could and should have seen from the outset as a corollary of the first or one that the Organisation should have expected. The complainant is mistaken in arguing that the two claims are inseparable on the grounds that both arose from non-renewal and the Tribunal must review all the effects of non-renewal. He put forward no such argument when he applied for waiver. Besides, a staff member may always limit his claims so as to satisfy the rule that he must have exhausted the internal means of redress: see, for example, Judgment 1149 (in re Baillod) under 4. So the claim to damages, distinct as it is from the claim under 40(b), is irreceivable. That being so, there is no need to say whether it is irreceivable also for failure to meet the time limit in Article VII(2) of the Tribunal's Statute or is devoid of merit.

The merits

3. Article 40 of the Staff Regulations ("Sick leave") reads:

> "A staff member who is unfit for duty because of illness or accident or unable to report for work because of public health measures shall be granted sick leave on the following terms:
>
> (a) Sick leave shall be approved on the Director General's behalf.
>
> (b) Any staff member not appointed under Article 33(3) shall be entitled to sick leave on full pay for up to nine months and on half pay for up to nine in any unbroken period of eighteen months, the total period of such leave in any unbroken period of four years not to exceed eighteen months. ..."*

* Registry's translation.

4. On 20 October 1994 the complainant wrote to the Administrative Committee relying on a medical certificate from his own doctor which said he had been ill since 5 September 1994 and claiming payment under Article 40(b) after 31 December 1994. He made out that after that date he was entitled, not to his pay as such, but to a "social" benefit of an equivalent amount. By a decision of 28 November 1994, the one now impugned, the Committee refused his claim on the grounds that his appointment was to end at 31 December 1994 and that the benefit of 40(b) might be due only to someone still in the Organisation's employ. The Organisation presses the plea in its reply.

5. Citing Judgments 607 (in re Verron) and 938 (in re Hill No. 2), the complainant claims entitlement to sick leave beyond 31 December 1994, the date of expiry of his appointment as Director General. That would mean a corresponding extension of appointment and payment of salary for the duration of his illness in accordance with 40(b).

6. The judgments he relies on must not be read out of context. The Tribunal was not ruling therein that someone who falls ill towards the end of his appointment should, whatever the circumstances, be entitled to sick leave, to the consequent extension beyond the date of expiry and to pay for the same term. Indeed it ruled out the idea of such extension in Judgment 157 (in re Antonaci). It did order one in Judgment 607, but that was because the rules of the defendant organisation so allowed and the circumstances of the case so warranted, in particular a connection that the organisation had kept with the complainant after expiry of the last extension of his contract. In the case that the Tribunal ruled on in Judgment 938 the defendant organisation had dismissed the complainant, a typist, at a time when she said she was ill and had applied for sick leave. The organisation refused to grant her the leave on the grounds that she was not ill. Though the Tribunal held in 12 that "a staff member cannot be separated while on sick leave", the ruling must be seen in context: it cannot apply to termination in any circumstances whatever. Thus Judgment 1149 (in re Baillod) held that a staff member might not apply for sick leave with pay beyond the date of departure on retirement.

7. The upshot is that whether sick leave is to be extended beyond the date of expiry of an appointment is a question to be seen first and foremost in the light of the social protection afforded by an organisation's rules, which are to be construed according to the law of the international civil service.

8. The precedents cited by the complainant are irrelevant. His case is different from Verron because there is no provision in the Staff Regulations allowing the grant of sick leave beyond the date of expiry of appointment; and from Hill

because there was no wrongful dismissal of someone who was ill. The complainant's appointment as Director General was for five years and he had already decided in June 1994, before he fell ill, not to seek renewal. Articles 39 to 43 of the Staff Regulations afford the staff ample social protection. Article 39 requires them to take out sickness insurance to which the Organisation contributes. According to Article 43 they are covered by the Swiss Federal Insurance Fund against old age, invalidity and death (Article 43), over and above the old-age, invalidity and survivors' benefits they get under compulsory Swiss insurance. In such circumstances, where the staff member's appointment expires and he decides, when still well, not to carry on, and where he has adequate social protection against illness and invalidity, there are no social grounds - as there were in Verron - for granting him sick leave after the expiry of his appointment.

9. Lastly, when the complainant put his case to the Administrative Committee he applied, not for sick leave beyond 31 December 1994, but only for the payment of social benefits in an amount equivalent to the pay of a staff member on sick leave. As the Committee pointed out, the Staff Regulations make no provision for benefits of that kind.

10. In the light of the foregoing the complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re BRUN

Judgment 1495

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Raymond Brun against the European Organization for Nuclear Research (CERN) on 16 September 1994, CERN's reply of 16 December 1994, the complainant's rejoinder of 12 April 1995 and the Organization's surrejoinder of 19 June 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman born in 1946, joined the staff of CERN at 1 January 1974. He was a laboratory electronics technician at grade 7. He was promoted as from 1 July 1980 to grade 8 as a technical assistant. As from 1 January 1983 he was assigned to the LEP Division. At 1 July 1987 he was promoted to grade 9 on a post of principal technical assistant and at 1 January 1990 he was transferred to a division known as SL.

On 24 August 1990 CERN issued a notice of vacancy, No. SL-RFL-90-78-IN, announcing an internal competition for a post as electronics engineer or physicist in SL. The post was to be at grade 9 or 10 and in occupational category 2, but the notice explained that the title, grade and code might change according to the incumbent's education and years of experience. No engineers or physicists having applied, the Leader of SL offered the complainant in the spring of 1991 an assignment in the Radio-frequency group (SL-RFL) to which the vacant post belonged. By a memorandum dated 11 April 1991 the Leader of SL confirmed the complainant's transfer as from 15 April 1991 so

as "to give the group the technical support it needs to carry out [its] plan for development of the LEP project".

On 21 June 1991 CERN decided on a new scheme for "merit-oriented advancement", known as MOAS, and the scheme came into force at 1 August 1991. Every staff member was to be put on a "career path", each comprising grades and steps. At the time the complainant held grade 9 and his duties were in category 3, which corresponded to career path VI. The vacant post was in category 2 and therefore to be put on path VII.

By a notice of administrative action dated 27 August 1991 the Leader of the Personnel Division notified to the complainant confirmation of his formal transfer to SL-RFL at 1 September. He sent it back duly signed but with the comment: "Transfer agreed provided duties are changed as shown in the attached [Personnel action form] and notice of vacancy". The form indicated that notice SL-RFL-90-78-IN had been revised, SL having removed one of the prescribed duties.

By a letter of 3 December 1991 the complainant told the Leader of the Personnel Division that, having got no answer, he took it that his transfer to the advertised post with the change in duties had taken effect "in category 200 and so ... on path VII".

At a meeting on 28 January 1992 representatives of SL and Personnel gave him to understand that his new assignment brought about a change in duties that afforded an "opportunity of access to a higher level than before". By a letter of 3 February the head of Personnel Services told him that that was so, though the Technical Engineers and Administrative Careers Committee (TEACC) would have to approve any move to path VII.

By a letter of 14 February 1992 the Leader of the Personnel Division informed him that in keeping with the "Instructions for the designation of career paths to present staff members", issued on 3 October 1991, he would be on path VI as from 1 March 1992.

In a letter of 28 March 1992 to the head of Personnel Services he expressed disagreement with the terms of the letter of 3 February.

SL proposed changing his career path, and the matter went to the TEACC in 1992. It recommended keeping him on path VI. In 1993 it reviewed his case and in a report of 16 October reached the same conclusion. The decision was notified to him in November 1993 on a "job information form".

By a letter of 2 December 1993 to the Director-General he lodged an appeal with the Joint Advisory Appeals Board. In its

report of 27 May 1994 the Board recommended keeping him on path VI. By a letter of 21 June 1994, the impugned decision, the Director-General informed the complainant that he had endorsed the recommendation.

B. The complainant has four pleas.

The first is that the impugned decision rests on a mistake of fact. The Director-General acted on a recommendation by the TEACC, which was wrong to describe his duties as consisting "mainly of adapting existing hardware and software". When he joined SL-RFL only the hardware had been installed.

His second plea is that the TEACC got the procedure wrong too: only two of its members saw him and were able to assess his work properly.

Thirdly, he pleads breach of a promise he got on transfer to put him on path VII. Post SL-RFL-90-78-IN, the one he says he was appointed to, was plainly said to be on that path. So CERN committed a breach of trust.

Lastly, CERN broke Staff Regulation R II 2.07, which requires a change of career path when someone "permanently assumes duties which correspond to those defined for another career path". Since transfer the complainant's duties as set out in the post description do warrant path VII.

He asks the Tribunal to set aside the decision to put him on path VI and declare his right to path VII. He claims moral damages and costs.

C. In its reply CERN denies making him any promise over his transfer to post SL-RFL-90-78-IN. No-one ever offered him such transfer or said he would be in category 2. He does not have the sort of formal qualifications that that category calls for. All he was promised was assignment to SL-RFL with new duties as a senior technical assistant in category 3. At the time the Leader of SL explained to him that changing to path VII would mean going through the TEACC procedure.

CERN contends that there was no question of applying R II 2.07 since, as the TEACC twice pointed out, he was not permanently carrying out duties corresponding to path VII.

CERN made no mistake ~~of~~ fact. The TEACC was quite able to assess his work "properly", and it did consist in bringing software into use by "adapting" it.

There was no breach of procedure: the rules lay down no special procedure for the TEACC, which acted in this case in line with custom.

D. The complainant maintains in his rejoinder that the Leader of SL expressly offered him assignment to post SL-RFL-90-78-IN, which was on path VII. That he did not have the proper qualifications is neither here nor there since none of the applicants did anyway.

Since his grade, which is 9, is the highest on path VI, a change of path would open up a new career for him.

Though his duties are not as extensive as those in the original notice they are still those of an engineer, and his supervisors have acknowledged that he is performing the duties of the post. He asks the Tribunal to discount an item appended to CERN's reply and headed "Post description".

E. In its surrejoinder CERN presses its pleas and submits that even if it had put him on the post it would have had to change the title and grade because he lacked the university qualifications required.

CONSIDERATIONS:

The background

1. The complainant has been with CERN since 1 January 1974. He has a diploma of senior technical studies and a certificate in robotics. CERN recruited him as a "laboratory technician (electronics)" at step 2 in grade 7. By 1 July 1987 he had reached grade 9 as a senior technical assistant (electronics). At 1 January 1990 he was transferred to a division known as SL.

2. In August 1990 SL put up for internal competition a post in a group, RFL, for an electronics engineer or physicist, who was to help in developing and maintaining instruments to control a radio-frequency system. The notice of vacancy was SL-RFL-90-78-IN.

3. CERN brought in a "merit-oriented advancement scheme" (MOAS) for the advancement of staff along "career paths". Posts are put on such paths, each of which consists of grades. When permanent duties so change as to match the path no longer, the path changes.

4. The complainant's duties were declared to warrant path VI (occupational category 3), which comprises grades numbered 7, 8, 9 and, for staff of outstanding merit, 10. Path VII corresponds to grades 9 and 10. It is for qualified engineers and physicists, but is also open to technicians who have developed skills on the job and who have been carrying out equivalent duties, provided that a technical body appointed for the purpose, the TEACC, gives its approval. As described in the notice the post carried the code number 204/211, which put it in occupational category 2, and corresponded to grades 9 and 10. But the official form stated: "The title, grade and code are subject to change according to education and the number of years' experience".

5. No engineers or physicists having applied for the post, the Leader of SL approached the complainant in the spring of 1991 and offered him transfer to SL-RFL. Having little hope of promotion if he stayed on path VI, the complainant expressed interest in the post in the belief that carrying out the duties of an engineer or physicist would help to put him on path VII. He accepted. In a memorandum of 11 April 1991 the Leader of SL confirmed the change of duties, which was to be provisional for three months, and said:

> "You will be giving the group technical assistance in carrying out its programme of development for the LEP project. Your experience and skills will be great assets ... After the trial period, and if both you and RFL agree, you will get formal transfer. A new post description will then be made and put to the Personnel Division for entry in your personal file."

In his reply of 15 April 1991 the complainant confirmed several points and thanked the Leader for his support. At the end of the trial period a notice of administrative action from the Personnel Division, dated 27 August 1991, confirmed his new duties as from 1 September 1991. On 29 September 1991 he signed the form and sent it back with the comment: "Transfer agreed provided duties are changed as shown in the attached [Personnel action form] and notice of vacancy". He appended a draft form dated 16 August 1991 which announced "Change of group from 1 September 1991 with change of duties from SL-PC to SL-RFL (Post SL-RFL-90-78-IN changed, see attached copy of vacancy notice)". On the appended notice one of the original duties - "the overall control of the LEP's RF system from the Prévessin Control Room" - had been struck out in ink. CERN did not respond at once. On 3 December 1991 the complainant wrote to the Leader of the Personnel Division citing his own qualified consent and saying:

> "After waiting for 60 days I understand that my transfer with a change in duties has taken effect on the stated

post (SL-RFL-90-78-IN) in category 200 and so, in line with new personnel policy, on path VII."

He asked for written confirmation of his new career path. On 18 December 1991 a personnel officer rejected his point of view and said that the decision had made no difference to his contractual status.

6. There followed meetings and correspondence on the subject. The complainant insisted that the transfer entailed a change in duties which gave him under Staff Regulation R II 2.07 the right of access to path VII; CERN maintained that under the rules, including administrative circular 26, headed "Annual interview, advancement and change of career path", and the annexes thereto, any change from path VI to VII was subject to review by the TEACC. In a letter of 3 February 1992 CERN told him:

"As was agreed by those concerned, your transfer to SL-RFL as from 1 September 1991 meant a change in duties and the opportunity of access to a higher level than before. ... In some respects your duties were akin to those set out in the notice about post SL-RFL-90-78-IN ... If SL are satisfied that all the duties of the post are now tending towards path VII it may make a proposal to the TEACC in the context of the yearly staff review, since you will have been on the post for at least one year."

He demurred.

7. A notice of administrative action of 21 February 1992 granted him another step to bring him to the fifth in grade 9. He later rose to steps 6 and 7. It is not in dispute that his supervisors found his performance quite satisfactory.

8. SL having proposed a change of path, the TEACC took up his case in 1992. It concluded:

"TEACC feels that, while the developments which R. Brun made in the PC group are technically outstanding and very successful, he is not yet operating at engineer level in his present post. It is recommended that he remain on Career Path VI for the present and that his case be re-examined when he has had an opportunity to fully develop his capabilities."

9. His case came up again in 1993, and this time the TEACC reported:

"Following a presentation to TEACC last year, it was decided that he should be reconsidered in 1993. TEACC appreciates the thoroughness of Mr. Brun's efforts, based

on solid technical skills. He is efficient, documents well and has a well earned reputation of providing reliable equipment in the foreseen time scale. However more extensive contacts with other groups working in the same field would be beneficial. We detect that he has the potential to take on further technical challenges but we do not think that his abilities are exploited in his present environment. TEACC considers that the complexity of his present tasks, which consist mainly of adapting existing hardware and software, corresponds to the level of a senior technician and therefore recommends that Mr. Brun be confirmed on Career Path VI."

10. On 2 December 1994 the complainant appealed to the Director-General against the decision not to put him on path VII. In its report of 27 May 1994 the Joint Advisory Appeals Board pointed out, among other things, that SL had not ruled out a change of path for him but had felt he did not have all the qualifications, in particular the academic ones. The Board compared the purportedly mandatory wording of Regulation R II 2.07 - "A change of career path shall occur ..." - with circular 26, which makes a change from path VI to VII conditional on going through the TEACC. It held that, though the two rules were not on a par in law and the circular could not derogate from the Regulations, there was only a seeming inconsistency between the two. Staff Rule I 1.05 empowered the Director-General to issue circulars to apply the Staff Regulations, circular 26 was an essential part of MOAS, and the TEACC's approval was necessary for a move from path VI to VII. So the circular was no derogation from the Regulations but a supplement thereto. The Board's recommendation reads:

"On the basis of the foregoing comments the Board unanimously recommends keeping Mr. Brun on path VI.

In view of the favourable comments both TEACC commissions have made the Board hopes very much that Mr. Brun and his supervisors will find a way to organise and define his duties so as to ensure that R. Brun wins the TEACC's approval in the near future.

In view of inconsistencies between Regulation R II 2.07 and circular 26 the Board hopes that the Regulations will be revised so as to clarify the position."

By a decision of 21 June 1994 - the one now impugned - the Director-General endorsed the Board's recommendation and kept his earlier stance.

11. The complainant has four pleas:

The impugned decision rests on a mistake of fact: the TEACC was wrong to take the view that his duties consisted

merely in "adapting" software. He found the software not yet in use and had to do far more than adapt it.

The procedure too was wrong. The full TEACC did not give him a hearing; only two of its members saw him, and he was not shown their findings.

The decision was in breach of Regulation R II 2.07. That provision alone applies - not circular 26 - and he qualifies under it.

CERN made him a promise at the time of transfer and has not kept it.

12. CERN seeks to refute each of his pleas.

It made, it says, no mistake of fact. Though the software was not in use when he came and he did have to get it going, that is just the kind of work that adapting software entails. Neither the TEACC nor the Director-General made any mistake of fact.

The written rules lay down no special procedure for the TEACC. The custom is for it to have one of its members report with help from an assessor who belongs to the staff. It has an internal report on each case. If necessary, it orders further submissions. There was nothing wrong with the procedure in this case.

The complainant is mistaken in saying he qualified under Regulation R II 2.07. His present duties are neither an engineer's nor a physicist's, as path VII requires, nor permanent.

The Organization made him no promise it has failed to keep. His new duties only partly matched the description in the original notice, one important item of which has gone. And there was no other promise. CERN explained to him that, subject to the rules about changing career paths, his transfer afforded an "opportunity of access to a higher level than before":

> "The Organization offered the complainant hopes of advancement and a change of path ... That may have aroused his interest in the assignment. ... His duties in his new group are still technical."

The Appeals Board's recommendation for giving him more taxing work

> "... was ultra vires: the Board is supposed to report on the lawfulness of the challenged decision,

not meddle in personnel management. And SL was not free to treat him better than other technicians with like qualifications and expectations."

13. The complainant asks the Tribunal to discount appendix 7 to CERN's reply - a post description - on the grounds that he has never seen it before. CERN says that it was in his personal file, but not that he had actually seen it. At all events it is of no detriment to his present case.

14. A decision determining a career path in accordance with CERN rules is analogous to a decision about grading. A long line of precedent leaves such a decision to the Director-General's discretion. So the decision must stand unless it was taken without authority or in breach of a formal or procedural rule, or rests on a mistake of fact or of law, or overlooks some material fact, or is tainted with misuse of authority, or unless an obviously wrong conclusion has been drawn from the evidence. And the Tribunal's own assessment of the evidence may not replace the Director-General's: see for example Judgment 1281 (in re Saunders 7).

15. The complainant is not actually challenging as such any appraisal the Director-General based on the TEACC's findings. The pleas he does put forward are limited in scope and are admissible in a case of this kind. He objects, for example, to the TEACC's failing to report that he had much more to do than just "adapt" software: he had to make it work. CERN does not deny that the job was a big one; it was, however, "adaptation" in the broadest sense. The complainant fails to show, and it is not self-evident, that the shift of emphasis would have sufficed to put his duties on a par with an engineer's or a physicist's. So the plea fails.

16. His objections to the procedure in the TEACC and its way of delegating authority seem to rest on two circumstances: that only two of its members spoke to him and that he never saw their findings. But he is neither challenging the basis of the procedure in law nor - apart from the point dealt with in 15 above - making any specific criticism of the findings that the Committee adopted on the strength of the assessment it had had carried out.

17. The plea again fails. Delegation of authority to look into a case - here the work was done by one member of the Committee with help from an assessor - is often a sensible approach: findings obtained by delegation may afford the competent body just the facts it needs. Besides, the complainant fails to show how the procedure may have impaired his rights.

18. Regulation R II 2.07 reads:

"A change of career path shall occur when a member of the personnel permanently assumes duties which correspond to those defined for another career path. ..."

Staff Rule I 1.05 says:

"In the application of the Regulations, the Director-General may publish administrative circulars, after consulting the Standing Concertation Committee provided for in Chapter VII."

And circular 26 provides:

"VI. CHANGES IN CAREER PATH
(Articles R II 2.01 and R II 2.07 - Annex R C 1)

13. At least 12 months after a staff member has taken up new major duties, his division leader (or equivalent) shall review the situation on the occasion of the next appraisal exercise. If he believes that a change of career path is justified, he shall seek the endorsement of the relevant director(s) and send a request to that end to Personnel Division which studies it and may authorize the change. A staff member may also submit a request giving grounds for a change of career path, via his division leader, to the Leader of Personnel Division. Normally, a change of career path may take place after the staff member has reached the last grade of the normal advancement zone of the career path.

14. Changes from Career Path VI to Career Path VII are subject to prior study by the 'Technical Engineers and Administrative Careers Committee' (TEACC), whose composition, mandate and procedural guide-lines are given in Annex III. However if, following the publication of a post vacancy notice in Career Path VII, a staff member with a recognized university qualification is assigned to this career path as the result of a selection procedure (Article R II 1.03), the opinion of the TEACC is not required."

19. The complainant fancied that his transfer, as notified to him on 27 August 1991, must mean a permanent change of duties within the meaning of R II 2.07 because the original notice of vacancy, which called for candidates with university

qualifications in electronics, robotics or physics, coded the post "204/211" and put it in grade "9/10". To his mind the change of duties alone entitled him to path VII.

20. He is wrong: as CERN submits, both fact and law are against him. A change of duties confers the right to a change of paths under R II 2.07 only if the new duties warrant another path. To apply that to the complainant's case, a technician who is on path VI must have permanent duties equivalent to those of someone with university qualifications as an engineer or physicist. It is mistaken to impute to CERN an acknowledgement from the outset that after transfer the complainant would be doing work in category 2. Besides, the original notice of vacancy mentioned the possibility of putting the post in another category and grade if the successful applicant's qualifications so warranted. And CERN gave the complainant lesser duties than those in the original notice. The plea cannot be sustained.

21. The complainant infers from CERN's handling of his case a promise that he could change paths later and he says it has not kept its promise. The case law sets several conditions for the enforcement of a promise: it must be a substantive one, to act or not to act, or to allow; it must come from someone competent to make it; whoever relies on it must suffer injury for the breach; and the position in law must not alter between the time of the promise and the time when it is to be discharged. The form it takes - be it written or oral, express or implied - is immaterial: see Judgments 782 (in re Gieser), 1040 (in re Douglas) and 1278 (in re Rogatko).

22. In this case the complainant has failed to show that CERN made him any enforceable promise to put him on path VII upon transfer.

DECISION:

For the above reasons,

The complaint is dismissed.

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re GÜSTEN

Judgment 1496

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rolf Güsten against the United Nations Food and Agriculture Organization (FAO) on 15 September 1994 and corrected on 29 December 1994, the FAO's reply of 18 May 1995, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 29 September 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1932, joined the FAO in Rome in September 1987 as Director of the Organization's Investment Centre, which is part of its Development Department. He held grade D.2.

In December 1992 the Director-General ordered an audit of the Investment Support Programme (ISP), one of the Centre's two branches. The audit took from January to April 1993, and the auditors asked the complainant for information. In a report of 30 April 1993 they spoke of mismanagement of the Programme's Management Support Unit. By a memorandum of 31 May 1993 to the Assistant Director-General in charge of the Development Department the complainant rejected the charges, though he said he found the report "fair and balanced".

In July 1992 the Organization had recruited a Mrs. Silverberg at grade P.5 to work for a new unit of the Centre under an appointment that was to run from 1 September 1992 to 31 August 1993. But the plan came to naught and the Director-General decided in February 1993 to end her appointment. When the complainant saw the Director-General on 16 February he objected, it appears, to the decision. The

Director-General confirmed it, and the complainant wrote to him the same day offering to resign. But he withdrew his offer in a letter of 10 March 1993 on the grounds that the matter at issue had been "resolved". Mrs. Silverberg's appointment ended for all the complainant's attempts to have it extended.

On 2 June 1993 the Deputy Director-General saw the complainant, told him that the Director-General no longer trusted him to run the Centre and asked him to resign. By a memorandum of 4 June 1993 the Assistant Director-General in charge of the Development Department gave him a written warning under paragraph 314.22 of the FAO Manual on the grounds of mismanagement of the Centre and told him he was transferred as from Monday 7 June to be a special adviser in the Development Department, still at grade D.2.

On 27 August 1993 he appealed to the Director-General against the decision of 4 June. By a letter of 24 September the Assistant Director-General in charge of the Administration and Finance Department told him that the Director-General had rejected his appeal.

On 5 October 1993 he went to the Appeals Committee. In its report of 29 April 1994 the Committee recommended rejection but suggested doing something to remove his "sense of injustice". In a letter of 27 June 1994 - the impugned decision - the Director-General upheld the earlier decision on the grounds, among others, that the complainant was about to retire anyway. He retired at 30 June 1994.

B. The complainant pleads breach of due process: the review was not objective; nor was the conduct of it adversarial, since he was not given his say.

He contends that his transfer amounted to a sanction which he drew on himself by his stance over Mrs. Silverberg. The FAO did not provide the guarantees that staff should enjoy when it takes disciplinary action.

The Director-General misused his authority by exercising his management prerogatives for purposes that the rules do not allow.

The circumstances of his transfer show the Organization's disregard for the dignity and good name of staff.

He seeks the quashing of the Director-General's decision of 27 June 1994 and awards of moral damages and costs.

C. In its reply the Organization finds fault with the complainant's version of the facts. In its submission the

transfer was no sanction but a decision taken in none but the Organization's interests. The reason why the Director-General ordered the audit was that the World Bank had made a change of policy that affected the funding of many of the Centre's projects. Though the audit showed the need for reforms the complainant was not the one to carry them out: he was about to retire, and he had given no inkling of the steps he would be taking to stop the mismanagement reported by the auditors.

His new post was comparable to the old one: it carried the same grade and senior responsibilities.

D. The complainant rejoins that the reply says nothing of his stand over Mrs. Silverberg, which he says started the dispute. He was willing to take steps to reform the management of the Centre. The Organization has failed, in his view, to answer the pleas in his complaint.

E. In its surrejoinder the FAO observes that the complainant's pleas rest on mere speculation and ignore the facts of the case. It maintains that the transfer did serve its own proper interests.

CONSIDERATIONS:

1. The complainant, who was born in 1932, joined the FAO in September 1987 at its headquarters in Rome as Director of its Investment Centre, which comes under the Development Department, and his grade was D.2.

2. By a memorandum of 4 June 1993 the Assistant Director-General in charge of the Development Department gave him a written warning on the Director-General's behalf under FAO Manual paragraph 314.22 on the grounds of shortcomings which auditing had disclosed in the work of the Centre and his unsuitable reaction. The Assistant Director-General told him that in the Organization's interests the Director-General was transferring him to another post in the Department as "special adviser" at the same grade as from 7 June 1993. The stated reason for the decision was the need to overhaul the Centre because of new agreements with the World Bank. The complainant appealed to no avail against the transfer. In a final decision of 27 June 1994 the Director-General confirmed it on the recommendation of the Appeals Committee, even though in its report of 29 April 1994 the Committee had expressed serious misgivings on the score of procedure and had taken the Administration to task for treating him inconsiderately.

3. In the complainant's submission the decision was a hidden disciplinary sanction or even an act of reprisal for his having disagreed with the Director-General about the termination of the appointment of one of the Centre's employees. The Director-General had thought that the Organization's interests warranted the termination whereas the complainant saw it as wrong on both legal and moral grounds.

4. The complainant pleads flaws in the auditing procedure: he was not warned that his transfer was mooted and so was denied his say; the transfer was unwarranted since he was able to carry on as before until the end of his appointment; and it was a serious blow to his dignity to shift him at but a day or so's notice to an almost meaningless job.

5. The FAO's answer is that the transfer was dictated by nothing but its own interests: a new method of funding by the World Bank had brought about change in its investment policy; internal and external auditing had shown up the complainant's shortcomings; the Director-General had lost confidence in him; and since he was retiring anyway it was time for younger people to take over and carry out the reforms that the Centre's new ventures called for.

6. FAO Staff Regulation 301.012, which is about transfer, reads:

> "Staff members are subject to the authority of the Director-General, who may assign them to any of the activities or offices of the Organization, and to whom they are responsible in the exercise of their functions."

and Manual paragraph 311.412 says:

> "A staff member who is subject to an interdivisional/interdepartmental transfer is informed in writing by Personnel Division of the proposed transfer and its reasons and given the opportunity to present possible observations. However, in accordance with Staff Regulation 301.012, the final decision rests with the Director-General or with the officer so delegated."

7. A long line of precedent allows the Director-General discretion over transfer and so his decision is subject only to limited review. The Tribunal will not set it aside unless it is ultra vires, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority.

8. Thus the Tribunal would allow a complaint against such a decision if it were a hidden disciplinary sanction because there are specific procedural rules to protect a staff

member when disciplinary action is taken: see for example Judgments 126 (in re Danjean Nos. 1 and 2) under 4 and 9, 1078 (in re Schaack) under 16, and 1407 (in re Diotallevi No. 3) under 18. In processing, ordering and notifying transfer an organisation must heed the staff member's dignity and good name and not cause unnecessary hardship: see Judgments 367 (in re Sita Ram) under 13 and 14, 631 (in re Go) under 27 and 28, 942 (in re Leprince) under 4, and 1234 (in re Crockett) under 15 and 19. And the decision must follow a proper enquiry: see Judgment 942 under 4.

9. As to the staff member's right to have his say before transfer Judgment 631 said in 28:

> "... whether or not there is a specific provision in the Staff Rules, as a matter of contractual obligation the Administration ought not to take a decision injuriously affecting a staff member's career without first, as a matter of natural justice, giving him the reasons for the decision and getting his response."

Again, in Judgment 810 (in re Najman No. 5) a passage in 7 said:

> "What good faith requires is that when someone is transferred he should be given proper notice, and not just of a vague intention, but of the nature of the post he is to get and of the duty station. The principle does have to be applied flexibly, and transfer may be lawful even if no notice is given provided that there is enough time before it takes effect."

In that case the condition was not met: the staff member heard of the transfer only a few days beforehand, though there was neither word nor evidence of urgency, and was not even told what the new job was to be. In Judgment 1234 the Tribunal ruled in 19:

> "Of course [the Organization's] own interests are paramount, but it must still, for the sake of proper management and mutual confidence, treat its staff fairly. If it is transferring a staff member it must let him have a degree of responsibility corresponding to his grade and respect his dignity. It must give him a statement of the reasons for the transfer and the opportunity of responding."

So one requirement of the case law is that the staff member be given a hearing beforehand when the transfer may harm his dignity or private interests and is not a matter of urgency.

10. The complainant pleads both formal and substantive flaws in the decision he is challenging. The Tribunal will not

go into the merits of the internal and external audits the Organization ordered. But it is obvious that the FAO did fail to follow the proper procedure for transfer. It neglected to tell him before transfer that it was looking into the matter or even that a transfer was being mooted, and he was given no opportunity of stating his views on the subject.

11. There were several reasons why it should have given him a hearing. Having been in charge of the Centre for over six years, he was bound to find it very wounding to be shunted into an ill-defined non-managerial post. Transfer came, for no apparent reason, as a bolt from the blue; and that was the more unfortunate in that there was seemingly no attempt to check that his new post was the one best suited to his qualifications and position. Even the Organization's own rules required it to give him a hearing before transfer. The Appeals Committee regretted the secretiveness of the Director-General's move, the want of discussion on the findings of the two audits, the suddenness of the transfer, and the discrepancy between the complainant's duties old and new. The Organization's flagrant disregard of his right to a hearing was a breach of due process, and by following a procedure that offended unnecessarily against his dignity and personal feelings the Organization failed in the duties it owes to its staff. For those reasons the impugned decision cannot stand. That being so, there is no need to entertain the complainant's pleas about substantive flaws in the decision itself.

12. Since the complainant has retired the Tribunal may not order his reinstatement and it would serve no purpose to send the case back to the Organization for proper resumption of the procedure. The question is whether the injury warrants some other type of redress.

13. The abruptness of the complainant's transfer could scarcely be put down to the Organization's needs. As the Appeals Committee said, his new job was not on a par with the old one or in keeping with his qualifications. The point of it was not explained to him at the time and it seems unlikely that the Organization even tried to find him a more suitable one. The manner of it was calculated to offend his dignity, and the FAO proved inconsiderate. The conclusion is that its unlawful behaviour and the seriousness of its offence warrant redress. The letter of appreciation that the Director-General sent him on retirement will not suffice since it failed to acknowledge the unnecessary injury he had suffered. The Tribunal will therefore order the Organization to pay him moral damages, and in the circumstances it sets the amount at 10,000 United States dollars. He is also awarded costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 June 1994 is set aside.

2. The Organization shall pay the complainant 10,000 United States dollars in damages for moral injury.

3. It shall pay him 20,000 French francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re FLORES

Judgment 1497

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roberto Flores against the World Health Organization (WHO) on 21 October 1994, the WHO's reply of 20 January 1995, the complainant's rejoinder of 1 March and the Organization's surrejoinder of 31 May 1995;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Peruvian, joined the staff of the WHO on 18 September 1989 under the first of three short-term appointments. He was an accounting assistant at grade G.5 in the Organization's Regional Office for the Americas (AMRO) at Washington, D.C. His last appointment expired at 29 February 1992.

On 11 October 1991 the WHO issued a notice of vacancy, No. 91/PAHO/127, about two grade G.6 posts for accounting assistants II, and he applied for both of them. The ad hoc selection committee interviewed him, but he learned on 24 June 1992 that the Regional Director had chosen two others, one of whom was Miss Victoria Merino, an internal applicant.

On 21 August 1992 he appealed to the regional Board of Appeal against the appointment of Miss Merino to one of the posts. In its report of 24 June 1993 the regional Board recommended rejecting his appeal as irreceivable because as the holder of a short-term appointment he did not enjoy "the same terms and conditions as a fixed-term appointee". By a decision dated 20 August 1993 the Regional Director endorsed the Board's recommendation.

On 19 October 1993 the complainant put his case to the headquarters Board of Appeal. In its report of 18 June 1994 the headquarters Board held his appeal to be receivable but recommended rejecting it on the merits. In a letter of 12 July 1994, which he impugns, the Director-General endorsed that recommendation.

B. The complainant submits that the decision to appoint Miss Merino is unlawful. He has three main pleas.

First, he argues, she lacked the language skills which the notice stated to be a basic requirement for the post she was appointed to. Secondly, the Administration disregarded his own qualifications: at the material time he had two years' experience on the job and a degree in economics, and he was studying for a higher degree in finance and accounts at the Virginia Polytechnic Institute. And thirdly, the interviews were unfair. Other candidates knew beforehand that there was to be a formal examination and had time to prepare. Two of the three questions were the same for everyone but since the examination was not written the questions were unlikely to be put in the same terms to each candidate and in any event there was no hiding the candidates' identity.

He claims damages and costs.

C. In its reply the WHO contends that the process of selection fully complied with the rules. The appointment of staff is at the Director-General's discretion and it is not for the Tribunal to compare the merits of candidates. Miss Merino did have a "working knowledge" of English, which was what the notice required. The selection committee took full account of the complainant's qualifications before unanimously rejecting him. The Organization denies holding a "formal examination" during the interviews.

D. In his rejoinder the complainant submits that the evidence the selection committee had of Miss Merino's language skills was circumstantial and at odds with the facts. There is but one statement on record about his own fitness for the post - from the chief of the unit to which the two vacant posts belonged - and it mistakenly says he lacked the "educational and work experience qualifications". If there was no examination during the interviews why did the regional Board describe the use of tests as "documented in this case"?

E. In its surrejoinder the WHO answers the complainant's objections in his rejoinder and maintains that the evidence it is relying on is sound. According to the case law, questions and answers at interviews do not amount to examination.

CONSIDERATIONS:

1. The World Health Organization employed the complainant as an accounting assistant at grade G.5 in the Department of Finance of its Regional Office for the Americas. He held three short-term contracts, from 18 September 1989 to 31 August 1990, from 1 October 1990 to 31 July 1991 and from 30 August 1991 to 29 February 1992. On 11 October 1991 the Organization issued a notice about two vacant posts at grade G.6 for accounting assistants in the Department. On 15 October the complainant applied for both posts. The qualifications that the notice required included some training in accounting, very good knowledge of English or Spanish and a working knowledge of the other language.

2. Officials of the Department interviewed the candidates and examined their qualifications. On 9 December 1991 the chief of the Department sent the chief of Personnel a report containing detailed comments on each of them and recommended appointing Mr. Silvio Otero to one post and Mr. Luis Proaño to the other. The selection committee then considered the candidates. In its report of 22 January 1992 it decided by a vote of four to one to recommend Mr. Otero for the one post and Miss Victoria Merino for the other. The chief of Administration approved the recommendations and the two candidates were accordingly appointed.

3. The complainant did not object to the appointment of Mr. Otero but on 21 August 1992 lodged an internal appeal against that of Miss Merino on the grounds that she did not meet the minimum requirements of the notice, that neither the Department of Finance nor the Selection Committee had paid proper heed to his own qualifications, that the process of selection had included an examination that had not been announced beforehand and that the interviews had been unfairly carried out.

4. In its report of 24 June 1993 the regional Board of Appeal recommended rejecting the appeal on the grounds that it was irreceivable, and the Regional Director concurred on 20 August 1993. The case then went to the WHO's headquarters Board of Appeal. In its report of 18 June 1994 the headquarters Board held the appeal to be receivable but recommended dismissing it on the merits. By a letter of 12 July 1994 the Director-General adopted that recommendation. That is the impugned decision.

5. What, then, is the scope of the Tribunal's power of review in cases of this kind?

(a) As many judgments declare, a decision by an international organisation to make an appointment is a discretionary one and as such subject to only limited review. It may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence: see, for example, Judgment 1077 (in re Barahona). Moreover, the Tribunal will exercise its power of review with special caution when the decision is to make an appointment, not being competent to replace the organisation's assessment of the candidates with its own.

(b) Anyone who applies for a post to be filled by some process of selection is entitled to have his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever his hopes of success may be.

6. Within the ambit of its power of review as so defined the Tribunal will consider the formal aspects of the process of selection for the post at issue in this case. The notice of vacancy stated one of the basic requirements to be a very good knowledge of either Spanish or English and a working knowledge of the other. Though Miss Merino had a "very good knowledge" of Spanish the officials of the Department who were in charge of the interviews felt that she did "not meet the language requirements as her command of English is very elementary". The selection committee did say of her "weakness in English":

> "This latter factor was not given great weight by the majority since Ms. Merino has been serving successfully in posts in [the Organization] which have a higher requirement for English."

But the Committee does not state on what evidence it came to this conclusion, let alone that that evidence related to duties involving the use of the English language. Moreover, though the Organization identifies the posts that Miss Merino held earlier, it has failed to put acceptable evidence before the Tribunal to justify the conclusion that her good performance in those posts comprised a "working knowledge" of English.

7. The conclusion is that in appointing Miss Merino the Organization broke the basic rule of any process of selection that the successful applicant must have all the minimum qualifications required in the notice of vacancy.

8. The defendant argues that since Miss Merino was an internal candidate it was right anyway to give her priority in the process of selection. The plea fails. As the Tribunal held, for example, in Judgment 519 (in re Carbo), priority is not due to an internal applicant who does not have the minimum qualifications.

9. The complainant's other pleas fail. As was said above, the Tribunal will not assess candidates on merit or rule on an organisation's choice. Nor will it go into the matter of interviews. An organisation has discretion in holding interviews according to its own rules. The interviewers may have put questions to the applicants in this case and given them paper to jot down accounting exercises or make calculations; that does not mean they put the applicants through any formal examination.

10. The complainant states that he "has no interest in returning to the Organization". He asks the Tribunal simply to "grant compensation for the legal wrongs done to him and legal costs". The Tribunal therefore grants him compensation in accordance with Article VIII of its Statute, and it sets the amount at 5,000 United States dollars. It also awards him costs.

DECISION:

For the above reasons,

1. The World Health Organization shall pay the complainant damages in the amount of 5,000 United States dollars.

2. It shall pay him $2,000 in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mark Fernando Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re SCHIFFMANN, SIWY and YOUNG — Judgment 1498

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Alice Schiffmann, Mr. Peter Siwy and Mr. John Young against the International Atomic Energy Agency (IAEA) on 12 January 1995, the IAEA's reply of 13 April, the complainants' rejoinder of 2 June and the Agency's surrejoinder of 12 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As was explained under A in Judgment 1160 (in re Banota and others), the salary scales that apply to General Service staff in the United Nations system are reviewed every few years on the strength of comprehensive surveys of local practice. Interim adjustments may be made after "mini surveys". In 1985 the International Civil Service Commission (ICSC) approved a new "general methodology" for the surveys and the United Nations Consultative Committee on Administrative Questions (CCAQ) published a Manual on how to apply it. Paragraph A.2.2 of the Manual says that at each duty station a body known as the Local Salary Survey Committee should make the arrangements and that if none yet exists the "designated", or "lead", agency for the duty station should establish one. The IAEA is the "designated agency" for Vienna.

A comprehensive survey of salaries in Vienna was made in 1991. The upshot was that the executive heads of the organisations with headquarters there - the IAEA, the United Nations Industrial Development Organization (UNIDO) and the United Nations Vienna Office - decided jointly to apply an interim adjustment as from 1 April 1994 to the pay of staff in the General Service category.

By a memorandum of 26 January 1994 the president of the Staff Council of the IAEA drew the Director of Personnel's attention to changes which had come into effect on 1 January 1994 in Austrian tax law on social security contributions: he said that the interim adjustment should take those changes into account.

On 1 June the Director of Personnel sent a note to the Agency's Joint Advisory Committee expressing the view that not all the changes in tax law were relevant. In a note of 8 June to the Committee the staff representative repeated the position of the president of the Staff Council. At a meeting of the Committee on 9 June 1994 the Administration expressed the view that granting the staff's demands would set salaries too high. Staff and Administration failed to agree on the matter.

The president of the Staff Council confirmed his views in a letter of 16 June to the Director General. On 29 July the Director of Personnel answered that the Director General was to take account of only some of the changes in Austrian tax law and so the interim adjustment would be an increase of 3.8 per cent. The Agency formally announced that decision to its staff by a notice of 17 August 1994.

The complainants belong to the General Service category of the Agency's staff. On 10 October 1994 they sent the Director General a "complaint" asking him to put the interim adjustment up to 5.32 per cent and applying for leave to go straight to the Tribunal if he refused. By letters of 25 October 1994 - the impugned decisions - he rejected their request and gave them leave to come to the Tribunal.

B. The complainants submit that the Agency ought to have taken account of the changes in Austrian tax law insofar as they related to social security contributions. Citing a document of 14 April 1993 in which the Commission said that interim adjustments "should be automatic", they maintain that what counts in determining the adjustment is not wholly at the Agency's discretion. Besides, when Austrian tax law was last amended in 1989 the Agency promised to take account of the changes made as to social security contributions.

The Organization is wrong to make out that counting those changes would push salaries up too far. The methodology in force holds good until dropped or amended; and even if the next general survey bore out the Administration's view, the staff are entitled to have the existing rules observed until then.

The complainants ask the Tribunal to have their pay revised as from 1 April 1994 by ordering a further increase of 1.52 per cent. They claim 3,000 United States dollars each in costs.

C. In its reply the Agency contends that the complainants have misunderstood the Commission's guidelines and the nature of compulsory social security contributions.

It believes that it properly exercised its discretion. Salary scales must take account not just of local conditions but of the organisations' internal needs as well. Besides, the secretariat of the Commission said in a note of 11 February 1992 that it was "not advisable to attempt to reflect precisely through the salary scale every tax modification in all its detail".

There are no grounds for making the further calculations the complainants want in working out the interim adjustment. They are not a determinant of the wages of taxpayers in Austria and they are attributable not to any changes in Austrian tax law but to a desire to refund part of the sums taxpayers spend on social insurance. The Agency's General Service staff come under a different social security scheme.

According to the Commission's methodology any interim adjustment should have effects likely to be confirmed by later salary surveys. So it would have been ill-advised to raise salaries only to have to "freeze" them after the next salary survey because of the revised methodology the Commission approved in 1992.

The Agency alleges, lastly, that what it calls the "ad hoc" agreement of 1989 did not establish a practice, especially since the tax reforms of 1989 and 1994 were different.

D. In their rejoinder the complainants argue that, though not a determinant of the wages of Austrian taxpayers, social security contributions do have an impact on their net income. Besides, the Administration cannot consistently contend that contributions are small but that taking account of them would make salaries too high. There are no grounds for expecting a freeze in General Service pay after the next general survey.

E. In its surrejoinder the Agency presses its pleas about the differences between the 1989 and 1994 tax reforms and repeats that it did exercise its discretion lawfully.

CONSIDERATIONS:

1. The complainants, who are members of the General Service category of the IAEA's staff at headquarters in Vienna, are challenging the rate of the interim adjustment that the Agency made as from 1 April 1994 in the pay of such staff.

2. The general considerations which are applicable to the determination of General Service staff pay, and which are not in dispute, may be summed up as follows.

(a) In accordance with what is known as the Fleming principle the salaries of the General Service staff of organisations, like the IAEA, that belong to the common system of the United Nations must match the best prevailing conditions of service that other employers in the locality of the duty station grant to similar categories of employees.

(b) The International Civil Service Commission shall, according to Article 12 of its Statute, establish at headquarters duty stations and in some circumstances for other duty stations "the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

(c) Determining the best prevailing rates of pay of similar local employees at a duty station is a long and complicated process, requiring as it does the selection and survey of "comparator employers" and of comparable jobs in the locality. A general survey is carried out for the purpose only once every five years. It seeks to establish the gross pay of comparable "outside" employees in the locality, allowance being made for cash benefits and others and for deductions, exemptions and rebates in amounts which are typical and appropriate for each category of employee. Net levels of pay for outside employees are ascertained by subtracting taxes and other compulsory payments, and it is by reference to those levels that the net rates of pay for General Service staff in the United Nations common system are worked out. Gross rates are then calculated from the net figures, additions being made to take account of "staff assessment" and other payments.

(d) Since in the years between general surveys there may occur appreciable changes in rates of gross and net pay for outside employees yearly interim adjustments may be required. To determine whether they are, interim surveys are carried out.

3. The "methodology" followed in carrying out surveys and relevant to this case is the one that the Commission approved and set out in a report dated 14 April 1993* on the remuneration of staff in the General Service and related categories. As to interim adjustment the report says in paragraph 81:

"(a) The adjustment should be based on an appropriate wage or price index or a combination of indexes;

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* ICSC/37/R.18/Add.1.

(b) Indexes selected should be shown to produce salary movements that tend to be confirmed by successive salary surveys;

...

(f) ... Changes in local taxation should be accounted for at the time that such adjustments are made;

(g) The percentage adjustment to the net salary scale should be uniform at all levels, thereby leaving the structure of the salary scale intact ..."

4. The upshot of one interim survey was an interim adjustment as from 1 April 1994 in the pay of General Service staff at the Agency's headquarters in Vienna. The adjustment consisted in a 3.8 per cent rise in such pay which, among other things, the Agency announced to its staff in a notice, SEC/NOT/1542, dated 17 August 1994. Of that figure 3.06 per cent was accounted for by changes in indices of consumer prices and wages since 1 April 1993, when the last interim adjustment had been made. The remaining 0.74 per cent was due because of "certain changes in the local tax legislation". The general credit available to all taxpayers in Austria in the form of a direct deduction from income tax had been increased as from 1 January 1994 from 5,000 to 8,840 schillings a year. There is no dispute over these figures, nor over the 0.74 per cent increase that they accounted for.

5. By a letter dated 10 October 1994 the three complainants addressed to the Director General a request under Staff Rule 12.01.1(D)(1) for review of the figure of the 3.8 per cent increase. They said:

"... under the interim adjustment procedure prevailing in Vienna, it is necessary to take into account all, and not just 'certain', changes in local tax legislation. Specifically, instead of merely taking into account taxation changes amounting to 0.74%, leading to the announced interim adjustment of 3.8%, account should have been taken of taxation changes totalling 2.26%, leading to an interim adjustment of 5.32%."

They asked the Director General, if he refused to grant the further 1.52 per cent increase that they were accordingly claiming in General Service pay, to let them make a direct appeal to the Tribunal instead of going through the Joint Appeals Board. By a letter of 25 October 1994 the Director General informed them that he was upholding his decision but consented to direct appeal. That is the decision that they are impugning in their common complaint, which is receivable under Article VII(1) of the Tribunal's Statute, the internal means of redress being exhausted.

6. It is not in dispute that under Austrian law outside employees in the locality of the complainants' duty station are entitled to deductions from taxable income on account of compulsory contributions to social security schemes, premiums paid towards old-age and disability pensions and medical or unemployment insurance, dues to professional bodies, payments to building societies and the like. The amounts of such deductions from taxable income increased in the period at issue in this case because the percentage rates of such payments, or the maximum amounts to which such rates applied, or both, were increased under Austrian law. The result was a reduction in the income tax payable by "outside" employees in Vienna.

7. The Head of the Staff Administration Section of the Agency's Division of Personnel sent the secretariat of the Commission a letter by fax on 22 April 1994 asking it to assess separately the impact on the results of the survey of changes in the general tax credit and in tax rules as to social security contributions in Austria. The Chief of the Salaries and Allowances Division of the Commission answered the Agency in a minute of 27 April:

> "... The overall survey results before and after the tax changes are as follows:
>
> Before tax changes : -2.8%
>
> After tax changes
>
> - general tax credit only : -2.2%
> - social security contributions only : -1.3%."

He added:

> "... the results of these calculations were indicative rather than definitive ... I urge you to exercise caution in interpreting these results ..."

The Director of the Division of Personnel of the Agency concluded in a fax of 3 May to the Commission:

> "I understand that your calculations which take into account both the tax changes which took effect on 1 January 1994 and the combined index movement for the period March 1993 - March 1994 result in a salary increase of 2.4% in the current General Service salary scale ..."

The Chief of the Commission's Salaries and Allowances Division confirmed that understanding in a minute of the same date and added:

"... the tax impact of the change in social security contributions was included in our calculations resulting in the 2.4% increase."

8. The Tribunal observes that the calculations provided by the Commission on the strength of all the factors at issue would have warranted a total increase of only 2.4 per cent. Since that figure is lower than that of the increase which the Agency actually applied the Commission's calculations do not help the complainants' case.

9. The complainants contend that the reduction in the income tax payable by outside employees in the locality of their duty station, though it was attributable to amendments to social security legislation, amounted to a "change in local taxation"; that according to the methodology the Director-General had no discretion to discount that change in determining the interim adjustment for 1994; and that "any tax reduction increases the net incomes of employees, including those of the comparator employers".

10. The complainants do not, however, go on to show that the actual effect of the increase in social security contributions and of the reduction in income tax was to increase the net pay of outside employees. The Agency states in its reply that the increases in deductions from taxable income had two purposes. One was -

"... to partly reimburse the tax payer for increased costs in this particular case in relation to social security and other payments. Were these tax deductions 'blueprinted' on the salaries of GS [General Service] staff, they would lead to a direct increase in GS salaries, as GS staff are notably subject to a different social security regime and/or do not necessarily incur the same expenses as their counterparts in the 'outside world'."

The other purpose, says the Agency, was -

"... primarily to assist employees in the lowest income brackets who cannot be compared to Agency staff members."

The complainants do not take issue with those pleas in their rejoinder: they still maintain that all the changes should have been taken into account in determining the 1994 adjustment simply because they reduced the tax burden of such employees. For want of proof of any actual increase in the net incomes of outside employees the complainants' plea cannot be sustained.

11. The complainants further contend that, acting on the same principles and on the Commission's advice, the IAEA and the other international organisations in Vienna had taken account of changes in tax law insofar as they related to social

security contributions in determining the interim adjustment for 1989, and that the Agency was therefore wrong to ignore such changes in determining the adjustment for 1994.

12. The Agency's reply on that score may be summed up as follows:

(a) The setting of salary scales after a general survey is at its discretion, and so must be the determination of interim adjustments. Indeed - says the Agency - the complainants themselves acknowledge in their original brief that, although the secretariat of the Commission "may assist in making" calculations for an interim adjustment, "the Commission makes no recommendations concerning them, leaving the matter to the discretion of the organizations concerned". That too is the Commission's own view: in its minute of 27 April 1994, referred to in 7 above, it was also at pains to -

> "... emphasize that the power of decision on interim adjustment matters rests with the organizations rather than with the Commission which limits itself in the methodology to making general recommendation as to interim adjustment factors."

(b) Paragraph 81 of the methodology does not require that "all" the changes in local taxation be taken into account. It says "changes in local taxation", and that means changes in tax law as such, not "indirect effects on the local tax situation, which an increase or decrease in certain tax deductions ... may have". Besides, though organisations "should" take such changes into account, they are not bound to do so.

(c) The adjustment was made ad hoc in 1989; there was no such adjustment in any year from 1990 to 1993 and the IAEA was not required to make one in 1994. What happened in 1989, says the Agency, was that comprehensive tax reform in Austria -

> "... made it necessary at that time for all the elements in the formula for netting down gross to net salaries to be reviewed, as was done in previous salary surveys. ... the 1994 tax changes, however, were structurally different ... There was therefore, no justification to repeat in 1994 what was done in 1989."

(d) By 1994 the salaries of General Service staff were already on the high side as against those of outside employees in the locality of the duty station, and the next salary survey was likely to show that such staff were being over-compensated. So any further increase would have offended against the principle that interim adjustments should make for movements in pay that later surveys will tend to confirm.

13. The complainants rejoin that the Agency may not withhold increases that are due at present on the mere grounds that reductions may prove necessary later.

14. As is plain from the case law, the setting of pay scales is at an organisation's discretion. The Tribunal has recognised as much in Judgments 1000 (in re Clements, Patak and Rödl) and 1265 (in re Berlioz and others), where under 26 it said, quite specifically, that it would not interfere in the drafting of the salary policy that the exercise of such discretion was based on, even though it did have a power of review in the area. The discretionary authority of the Agency holds good for interim adjustments as well as for the setting of pay scales on the strength of the five-yearly general surveys.

15. Even supposing that, as the complainants contend, the indirect effects on taxation of the amendments to Austrian social security legislation did amount to "changes in local taxation" within the meaning of the methodology and that such changes should have been taken into account in 1994, as in 1989, the complainants' difficulty is again, as was said in 10 above, that they have not shown that the changes actually resulted in an increase in the net income for outside employees. The higher tax credit of 8,840 schillings did result in such increase and therefore warranted the 0.74 per cent rise in pay referred to in 4 above. But the evidence before the Tribunal is that only partly were the increases in social security contributions offset by tax reductions and that on that count there was no resultant increase in net income for local employees. Since the purpose of interim adjustment is to match any rise in the net incomes of local employees it would not have been proper for the Agency to exercise its discretion in the matter so as to take into account changes in local taxation that did not bring about any rise of that kind. The conclusion is that the grant of the further 1.52 per cent increase in General Service staff pay that the complainants are claiming would have been inconsistent with trends in local pay and would have resulted in salary movements in excess of increases in such pay.

16. The claim being unwarranted on those grounds, it is unnecessary to entertain any of the complainants' other pleas.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas

Michel Gentot

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL — INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF — *ADMINISTRATIVE TRIBUNAL*

EIGHTIETH SESSION

In re BERGER, KARAS and MORGAN — Judgment 1499

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Karl Berger, Mr. Oskar Karas and Miss Joanna Morgan against the United Nations Industrial Development Organization (UNIDO) on 17 January 1995, UNIDO's reply of 26 April, the complainants' rejoinder of 2 June and the Organization's surrejoinder of 14 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background of the present dispute appears, under A, in Judgment 1498 (in re Schiffmann, Siwy and Young), also delivered this day. At issue is the amount of interim adjustment payable from 1 April 1994 under the salary scale for General Service officials in the United Nations common system assigned to Vienna. The material adjustment was determined jointly by the executive heads of the three Vienna-based agencies - the International Atomic Energy Agency (IAEA), UNIDO and the United Nations Office at Vienna. The IAEA serves as what is called the "designated" or "lead" agency there.

In a memorandum of 31 March 1994 the president of UNIDO's Staff Council referred a senior officer in the Division of Administration to changes which had come into effect on 1 January 1994 in Austrian tax law on social security contributions: he said that the interim adjustment should take those changes into account.

On 9 June 1994, during a meeting of the IAEA's Joint Advisory Committee representatives of the Agency's Administration and staff failed to reach an agreement, the Administration taking the view that the changes in the tax law were not all relevant and would, if all taken into account, set salaries too high.

On 4 July 1994, at the 238th meeting of UNIDO's Joint Advisory Committee the representative of the Administration

stressed that, the IAEA being the "lead" agency for Vienna, UNIDO's salary scale should agree with the Agency's.

On 26 July, at the Committee's 239th meeting, the representative said that the three executive heads had agreed not to take account of all the changes in Austrian tax law and had set the interim adjustment at 3.8 per cent. By an information circular dated 30 August 1994 the Administration formally announced the Director-General's decision.

The complainants belong to the General Service category of UNIDO's staff. On 10 October 1994 they sent the Director-General a "complaint" asking him to put the interim adjustment up to 5.32 per cent and applying for leave to go straight to the Tribunal if he refused. By letters dated 7 December - the impugned decisions - he rejected their request for the increase and gave them leave to come to the Tribunal.

B. The complainants submit that the Administration ought to have taken account of the changes in Austrian tax law insofar as they related to social security contributions. Citing a document of 14 April 1993 in which the International Civil Service Commission (ICSC) said that interim adjustments "should be automatic", they maintain that what counts in determining the adjustment is not wholly at the Administration's discretion. Besides, when Austrian tax law was last amended in 1989 the Administration promised to take account of the changes made as to social security contributions.

The Administration is wrong to make out that counting those changes will push salaries up too far. The methodology in force holds good until dropped or amended; and even if the next general survey bore out the Administration's view, the staff are entitled to have the existing rules observed until then.

The complainants ask the Tribunal to have their pay revised as from 1 April 1994 by ordering a further increase of 1.52 per cent and to award each of them counsel fees in the amount of 3,000 United States dollars.

C. In its reply UNIDO submits that its exercise of discretion was lawful. Staff Regulation 6.5(a) empowers the Director-General to fix salary scales for staff in the General Service category on the basis of recommendations from the ICSC. But the Commission merely stated general principles - not binding rules - in order to leave the organisations a certain latitude in respect of the particular data to take into account.

The impugned decisions are lawful: there were no valid grounds for allowing the items the complainants mentioned to

enter in the reckoning of the adjustment inasmuch as they did not arise out of any change in Austria's tax law, but from a desire to refund part of the sums taxpayers spend on social insurance. But officials in the General Service staff come under a different social security scheme.

What is more, under the "general methodology" which the Commission adopted in 1985 interim adjustments are subject to confirmation in later salary surveys. So it would have been ill-advised to raise salaries only to have to "freeze" them after the next salary survey because of the revised methodology the Commission approved in 1992.

UNIDO alleges, lastly, that what it calls the "ad hoc" agreement of 1989 did not establish a practice, especially since the tax reforms of 1989 and 1994 were different.

D. In their rejoinder the complainants repeat that the Director-General has no real discretion in the matter. They insist that the Commission's change of methodology did not entitle the Administration to "jump the gun" by applying rules it expected to be coming into force later on. The Administration must, they contend, take account of any increase in the net remuneration of Austrian employees - whatever the cause. The new methodology will not result in a "freeze" of salaries after the next general survey because the Commission decided in 1992 to bring it in by a phased approach.

E. In its surrejoinder the Organization presses its pleas in their entirety. The Commission has not approved a "phased approach" and, however that may be, the next survey will see a reduction in the salaries of General Service staff.

CONSIDERATIONS:

1. The complainants, who are members of the General Service category of UNIDO's staff at headquarters in Vienna, are challenging the rate of the interim adjustment that the Organization made as from 1 April 1994 in the pay of such staff.

2. The general considerations which are applicable to the determination of General Service staff pay, and which are not in dispute, may be summed up as follows.

(a) In accordance with what is known as the Fleming principle the salaries of the General Service staff of UNIDO

and other organisations that belong to the common system of the United Nations must match the best prevailing conditions of service that other employers in the locality of the duty station grant to similar categories of employees.

(b) The International Civil Service Commission shall, according to Article 12 of its Statute, establish at headquarters duty stations and in some circumstances for other duty stations "the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

(c) Determining the best prevailing rates of pay of similar local employees at a duty station is a long and complicated process, requiring as it does the selection and survey of "comparator employers" and of comparable jobs in the locality. A general survey is carried out for the purpose only once every five years. It seeks to establish the gross pay of comparable "outside" employees in the locality, allowance being made for cash benefits and others and for deductions, exemptions and rebates in amounts which are typical and appropriate for each category of employee. Net levels of pay for outside employees are ascertained by subtracting taxes and other compulsory payments, and it is by reference to those levels that the net rates of pay for General Service staff in the United Nations common system are worked out. Gross rates are then calculated from the net figures, additions being made to take account of "staff assessment" and other payments.

(d) Since in the years between general surveys there may occur appreciable changes in rates of gross and net pay for outside employees yearly interim adjustments may be required. To determine whether they are, interim surveys are carried out.

3. The "methodology" followed in carrying out surveys and relevant to this case is the one that the Commission approved and set out in a report dated 14 April 1993* on the remuneration of staff in the General Service and related categories. As to interim adjustment the report says in paragraph 81:

"(a) The adjustment should be based on an appropriate wage or price index or a combination of indexes;

(b) Indexes selected should be shown to produce salary movements that tend to be confirmed by successive salary surveys;

...

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* ICSC/37/R.18/Add.1.

(f) ... Changes in local taxation should be accounted for at the time that such adjustments are made;

(g) The percentage adjustment to the net salary scale should be uniform at all levels, thereby leaving the structure of the salary scale intact ..."

4. The upshot of one interim survey was an interim adjustment as from 1 April 1994 in the pay of General Service staff at the Organization's headquarters in Vienna. The adjustment consisted in a 3.8 per cent rise in such pay which, among other things, UNIDO announced to its staff in an information circular UNIDO/DA/PS/INF.1251, dated 30 August 1994. Of that figure 3.06 per cent was accounted for by changes in indices of consumer prices and wages since 1 April 1993, when the last interim adjustment had been made. The remaining 0.74 per cent was due because of "certain changes in the local tax legislation". The general credit available to all taxpayers in Austria in the form of a direct deduction from income tax had been increased as from 1 January 1994 from 5,000 to 8,840 schillings a year. There is no dispute over these figures, nor over the 0.74 per cent increase that they accounted for.

5. By a letter dated 10 October 1994 the three complainants addressed to the Director-General of the Organization a request under Staff Rule 112.02(a) for review of the figure of the 3.8 per cent increase. They said:

"... under the interim adjustment procedure prevailing in Vienna, it is necessary to take into account all, and not just 'certain', changes in local tax legislation. Concretely, instead of merely taking into account taxation changes amounting to 0.74%, leading to the announced interim adjustment of 3.8%, account should have been taken of taxation changes totalling 2.26%, leading to an interim adjustment of 5.32%."

They asked the Director-General, if he refused to grant the further 1.52 per cent increase that they were accordingly claiming in General Service pay, to let them make a direct appeal to the Tribunal instead of going through the Joint Appeals Board. By a letter of 7 December 1994 the Director-General informed them that he was upholding his decision but consented to direct appeal. That is the decision that they are impugning in their common complaint, which is receivable under Article VII(1) of the Tribunal's Statute, the internal means of redress being exhausted.

6. It is not in dispute that under Austrian law outside employees in the locality of the complainants' duty station are entitled to deductions from taxable income on account of compulsory contributions to social security schemes, premiums paid towards old-age and disability pensions and medical or

unemployment insurance, dues to professional bodies, payments to building societies and the like. The amounts of such deductions from taxable income increased in the period at issue in this case because the percentage rates of such payments, or the maximum amounts to which such rates applied, or both, were increased under Austrian law. The result was a reduction in the income tax payable by "outside" employees in Vienna.

7. The Head of the Staff Administration Section of the Division of Personnel of the International Atomic Energy Agency, which is the "lead" agency in salary matters at Vienna, sent the secretariat of the Commission a letter by fax on 22 April 1994 asking it to assess separately the impact on the results of the survey of changes in the general tax credit and in tax rules as to social security contributions in Austria. The Chief of the Salaries and Allowances Division of the Commission answered the Agency in a minute of 27 April:

> "... The overall survey results before and after the tax changes are as follows:
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> Before tax changes : -2.8%
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> After tax changes
>
> - general tax credit only : -2.2%
> - social security contributions only : -1.3%."

He added:

> "... the results of these calculations were indicative rather than definitive ... I urge you to exercise caution in interpreting these results ..."

The Director of the Division of Personnel of the Agency concluded in a fax of 3 May to the Commission:

> "I understand that your calculations which take into account both the tax changes which took effect on 1 January 1994 and the combined index movement for the period March 1993 - March 1994 result in a salary increase of 2.4% in the current General Service salary scale ..."

The Chief of the Commission's Salaries and Allowances Division confirmed that understanding in a minute of the same date and added:

> "... the tax impact of the change in social security contributions was <u>included</u> in our calculations resulting in the 2.4% increase."

8. The Tribunal observes that the calculations provided by the Commission on the strength of all the factors at issue

would have warranted a total increase of only 2.4 per cent. Since that figure is lower than that of the increase which UNIDO actually applied the Commission's calculations do not help the complainants' case.

9. The complainants contend that the reduction in the income tax payable by outside employees in the locality of their duty station, though it was attributable to amendments to social security legislation, amounted to a "change in local taxation"; that according to the methodology the Director-General had no discretion to discount that change in determining the interim adjustment for 1994; and that "any tax reduction increases the net incomes of employees, including those of the comparator employers".

10. The complainants do not, however, go on to show that the actual effect of the increase in social security contributions and of the reduction in income tax was to increase the net pay of outside employees. The Organization states in its reply that the increases in deductions from taxable income had two purposes. One was -

> "... to partly reimburse the tax payer for increased costs created by social security and other payments. This rationale, it seems, cannot be automatically applied to the salary situation of General Service staff who are under a different social security scheme and may not have the same expenses as the Austrian tax payers."

The other purpose, says UNIDO, was -

> "... essentially, to help employees in the lower income bracket, who could not be compared to [the lead agency's] staff."

The complainants do not take issue with those pleas in their rejoinder: they still maintain that all the changes should have been taken into account in determining the 1994 adjustment simply because they reduced the tax burden of such employees. For want of proof of any actual increase in the net incomes of outside employees the complainants' plea cannot be sustained.

11. The complainants further contend that, acting on the same principles and on the Commission's advice, UNIDO and the other international organisations in Vienna had taken account of changes in tax law insofar as they related to social security contributions in determining the interim adjustment for 1989, and that the Organization was therefore wrong to ignore such changes in determining the adjustment for 1994.

12. UNIDO's reply on that score may be summed up as follows:

(a) The setting of salary scales after a general survey is at its discretion, and so must be the determination of interim adjustments. Indeed - says the Organization - the complainants themselves acknowledge in their original brief that, although the secretariat of the Commission "may assist in making" calculations for an interim adjustment, "the Commission makes no recommendations concerning them, leaving the matter to the discretion of the organization concerned". That too is the Commission's own view: in its minute of 27 April 1994, referred to in 7 above, it was also at pains to -

> "... emphasize that the power of decision on interim adjustment matters rests with the organizations rather than with the Commission which limits itself in the methodology to making general recommendation as to interim adjustment factors."

(b) Paragraph 81 of the methodology does not require that "all" the changes in local taxation be taken into account. It says "changes in local taxation", and that means changes in tax law as such, not "effects on local taxation that may be caused by changes in laws other than tax laws that bring about an increase in certain tax deductible amounts". Besides, though organisations "should" take such changes into account, they are not bound to do so.

(c) The adjustment was made ad hoc in 1989; there was no such adjustment in any year from 1990 to 1993 and UNIDO was not required to make one in 1994. What happened in 1989, says UNIDO, was that comprehensive tax reform in Austria -

> "... made it necessary for all the elements in the formula for netting down gross to net salaries to be reviewed, as was done in salary surveys. The recent changes in the local tax legislation were limited in scope ... There was, therefore, no justification to repeat what was done, rightly or wrongly, in 1989."

(d) By 1994 the salaries of General Service staff were already on the high side as against those of outside employees in the locality of the duty station, and the next salary survey was likely to show that such staff were being over-compensated. So any further increase would have offended against the principle that interim adjustments should make for movements in pay that later surveys will tend to confirm.

13. The complainants rejoin that UNIDO may not withhold increases that are due at present on the mere grounds that reductions may prove necessary later.

14. As is plain from the case law, the setting of pay scales is at an organisation's discretion. The Tribunal has recognised as much in Judgments 1000 (in re Clements, Patak and Rödl) and 1265 (in re Berlioz and others), where under 26 it

said, quite specifically, that it would not interfere in the drafting of the salary policy that the exercise of such discretion was based on, even though it did have a power of review in the area. The discretionary authority of the Organization holds good for interim adjustments as well as for the setting of pay scales on the strength of the five-yearly general surveys.

15. Even supposing that, as the complainants contend, the indirect effects on taxation of the amendments to Austrian social security legislation did amount to "changes in local taxation" within the meaning of the methodology and that such changes should have been taken into account in 1994, as in 1989, the complainants' difficulty is again, as was said in 10 above, that they have not shown that the changes actually resulted in an increase in the net income for outside employees. The higher tax credit of 8,840 schillings did result in such increase and therefore warranted the 0.74 per cent rise in pay referred to in 4 above. But the evidence before the Tribunal is that only partly were the increases in social security contributions offset by tax reductions and that on that count there was no resultant increase in net income for local employees. Since the purpose of interim adjustment is to match any rise in the net incomes of local employees it would not have been proper for UNIDO to exercise its discretion in the matter so as to take into account changes in local taxation that did not bring about any rise of that kind. The conclusion is that the grant of the further 1.52 per cent increase in General Service staff pay that the complainants are claiming would have been inconsistent with trends in local pay and would have resulted in salary movements in excess of increases in such pay.

16. The claim being unwarranted on those grounds, it is unnecessary to entertain any of the complainants' other pleas.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas Michel Gentot Mark Fernando

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTIETH SESSION

In re PARY (No. 4)

Judgment 1500

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Lazaro Pary against the World Intellectual Property Organization (WIPO) on 8 February 1995 and corrected on 6 March, WIPO's reply of 14 April, the complainant's rejoinder of 18 May and the Organization's surrejoinder of 20 June 1995;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 4, paragraph 2, and 6, paragraphs 1 and 2, of its Rules;

Having examined the written evidence and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in WIPO is summed up under A in Judgment 1179 on his first complaint. At the time material to this case he was at step 11 in grade G.3.

By an internal memorandum of 21 January 1991 to the Legal Adviser the Director General of WIPO set out the criteria for the grant of personal promotion. An employee who had been in the same grade for ten years was to qualify for such promotion provided that performance had been satisfactory and employment had never been for less than full time in the ten years. The Director General might allow exceptions in some cases.

On 18 February 1994 the complainant wrote the Director General a letter headed "Long-service step increase" and claiming promotion under the above rules. He pointed out that since 1992 he had been at the same step in his grade and had already "gone beyond the top seniority step" prescribed for that grade in the salary scales of the United Nations common system, to which the Organization belongs. He pleaded breach of Staff Regulation 3.4. In a letter of 22 February the acting

head of the Personnel Division rejected his claim, citing Regulation 3.4 bis:

> "Staff members in the General Service category, who have completed at least twenty years of satisfactory service with the International Bureau and who have been at the top step of their grade for at least five years, shall be eligible to receive one additional step ..."

In a letter of 29 March 1994 to the Director General the complainant expressed the view that the reply betrayed misunderstanding of his claim to promotion, which rested on the memorandum of 21 January 1991, not on Regulation 3.4 bis: he wanted a higher grade, not just a higher step.

By a memorandum of 5 May 1994 the head of the Personnel Division upheld the earlier decision. He observed that the complainant failed anyway to qualify for promotion under the memorandum of 21 January 1991; though he had held grade G.3 for ten years the "reservations" in his appraisal reports of 17 October 1985 and 19 November 1990 disqualified him for personal promotion.

On 6 June 1994 he lodged an appeal with the Appeal Board asking for a survey to be made of all personal promotions at WIPO and for the grant of such promotion to himself in keeping with the memorandum. In its report of 3 November the Board rejected his appeal and recommended upholding the decision of 5 May 1994. The Director General notified rejection to him in a letter of 8 November 1994, the decision he is impugning.

B. The complainant sees discrimination in the refusal of personal promotion: many in like case got it.

He challenges the lawfulness of the memorandum of 21 January 1991. WIPO has never made it known to the staff at large: that is at odds with precedents that say a text will not apply unless published.

There were procedural flaws and misuse of authority in the entry of "reservations" in his performance reports for 1985 and 1990. The Organization offered him transfer to another unit provided he would not comment on the report for 1985; and as for the one for 1990, there were facts that the Appeal Board overlooked.

He asks the Tribunal to quash the impugned decision, order the Director General to grant him personal promotion as from 1 December 1993, and award him six months' pay in moral damages and 15,000 Swiss francs in costs.

C. In its reply WIPO contends that the complaint is irreceivable. In its submission the complaint form which the Registrar received on 8 February 1995 did not amount to a "complaint" within the meaning of Article VII(2) of the Tribunal's Statute and Article 4(2) of its Rules. Only after 10 February, when the Registrar asked him to "correct his complaint", did he file it; and though he identified in the complaint form the decision he was impugning he did not set out the facts or the pleas he meant to rely on. To be treated as a complaint the papers filed must explain the cause of action and the supporting pleas and they must be entered in time.

In subsidiary argument on the merits the defendant submits that it observed the criteria in the memorandum of 21 January 1991 for the grant of personal promotion. Though the complainant had the required ten years' service some of his appraisal reports in the material period described his performance as "satisfactory with reservations" and so disqualified him even for exceptional personal promotion. He was free to comment and did comment on the one dated 19 November 1990. Besides, it is odd of him to challenge the lawfulness of the very text on which he rests his claim to promotion.

He was not discriminated against: only staff members with satisfactory reports have had personal promotion.

To qualify for an extra step increase under Regulation 3.4 bis an employee must have twenty years' satisfactory service and have spent no fewer than five at the top step of the grade. The complainant had not completed twenty years' service. He can still get ahead at WIPO.

D. The complainant rejoins that there is no provision of the Tribunal's Statute or Rules which says that the mere filing of a complaint form will not do to lodge a complaint. The Registrar gave him leave to complete his submissions and he did so within the thirty-day time limit set in the Rules.

He cites the case of another official who had no better performance reports and did get personal promotion. WIPO has shown him hostility and victimised him for his "identity" and beliefs.

E. WIPO presses its pleas in its surrejoinder. In its submission the case the complainant cites is immaterial because the other employee had had satisfactory reports for the last five years and so qualified for personal promotion on exceptional grounds. The Organization denies discriminating against the complainant on the grounds of nationality or beliefs, a charge for which he offers not a jot of evidence.

CONSIDERATIONS:

Receivability

1. Article VII(2) of the Tribunal's Statute says that a complaint must be filed within ninety days after the complainant had notice of the impugned decision; Article 6(1) of the Rules sets out the requirements of form; and 6(2) says that if not satisfied that the complaint meets those requirements the Registrar shall call upon the complainant to correct it within thirty days. The Rules do not say that all the formal requirements must be met by the date of filing.

2. The complainant filed within the time limit in the Statute the complaint form provided for in the schedule to the Rules. The entries sufficed to identify the decision he was impugning and the relief he was claiming. The registering of the complaint and the correcting of it within the time limit were in line with the Rules. Since the complaint was lodged in time the Organization's objection to receivability fails.

The merits

3. The complainant is claiming personal promotion under a memorandum which the Director General signed on 21 January 1991 and which reads:

> "In principle, personal promotion will be granted to an employee who has been in the same grade for ten years, provided
>
> (i) that, during those ten years, none of the performance reports contains 'unsatisfactory' or 'satisfactory with reservations' annotations and
>
> (ii) that, during no part of the ten years, was the employee on less than full time.
>
> An exception to this principle may be envisaged if, during the second half of the ten-year period, (i) all performance reports had nothing but 'satisfactory' annotations and (ii) the employee was full time. If these two conditions are fulfilled, at the end of the 10-year period, the case should be brought to the attention of the Director General who will then decide whether a personal promotion should be granted. His decision will be based on a general assessment of the employee's performance and the expected performance of the employee in the future. If the Director General decided not to make an exception to the principle, the case should be brought again to his

attention at the end of the 12th year in the same grade if, during the 11th and 12th years, all the performance reports contained nothing but satisfactory annotations and the incumbent continued to be full time during those two years."

4. Personal promotion is not the same as advancement within the grade. Advancement is covered by Staff Regulation 3.4 and consists in rising by steps: any staff member qualifies for it who meets the conditions of seniority and "satisfactory service". Personal promotion means rising in grade without any change in duties and is a benefit that the Director General may bestow at discretion. He does so only in "exceptional circumstances" to reward someone for services of a quality higher than that ordinarily expected of the holder of the post.

5. Precedent has it that a discretionary decision is subject to no more than limited review. As the Tribunal said, for example, in Judgment 1179 on Mr. Pary's first complaint and in Judgment 1411 (in re Bidaud), it will set the decision aside only if it shows a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, or if it was ultra vires, or if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence.

6. The Director General made no improper exercise of his discretion in making rules about the grant of personal promotion. He thereby afforded the staff a safeguard of equal treatment.

7. Nor did the Director General misuse his discretion in applying the rules in this case. A report dated 17 October 1985 on the complainant's performance described it as "satisfactory with the following reservations: the accuracy and presentation of typing and assembly tasks are below par and he must bring them up to scratch". Again, his report of 19 November 1990 said his conduct was "satisfactory with the following reservations: Mr. Pary does not readily obey his supervisors' instructions". The last remark is the more telling in that the fault imputed to him is an objective finding, not a matter of assessment.

8. The complainant pleads that he has been discriminated against and that the Director General's decision shows formal flaws and misuse of authority.

9. The facts show no breach of equal treatment. There is no evidence to suggest that anyone else who failed to meet the requirements of the memorandum got personal promotion. The cases the complainant cited in the internal proceedings disclose no departure from those requirements. In the

rejoinder he puts to the Tribunal he does cite yet another case, but the Organization says he is mistaken. Since he has failed to discharge the burden of proof his plea fails.

10. As for his charge of unfair treatment in his career in general, he neither identifies any act of discrimination by the Organization nor shows in what way and for what reasons it may, in his view, have discriminated against him. The plea fails because it is not substantiated.

11. He contends that in applying the memorandum of 21 January 1991 to his case the Organization was free to disregard the comments in his appraisal reports because they are tainted with procedural flaws and misuse of authority. All that need be said on that score is that since the report of 19 November 1990 described his performance as merely "satisfactory with ... reservations", he failed to qualify for personal promotion because he did not meet the requirements of the memorandum. Judgment 1179, which dismissed his first complaint, upheld that report as lawful; so the issue is res judicata and not now open to appeal. He cannot properly impute "malice aforethought" to the reporting officer because he cites no fact he could not have relied on in his earlier complaint and which might afford valid grounds for review of Judgment 1179.

12. In the complainant's submission the Director General was misled by a "draft report" dated 27 September 1990 in his personnel file which described his performance as "unsatisfactory" and was therefore less favourable than the one written on 19 November 1990. But there is no reason to suppose that that text had any effect whatever on the impugned decision.

13. Lastly, he argues that the memorandum of 21 January 1991 is unlawful because it was not given the sort of publication that he says the case law and several international instruments required. But he did have access to the memorandum since he asked the Director General in his letter of 18 February 1994 to apply it in his favour. So lack of wider publication caused him no injury and affords no reason for declaring the memorandum null and void, the less so since the criteria it sets are objective and the Director General properly applied them in this instance.

14. The conclusion is that the complainant's pleas are devoid of merit and his complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In MEYLAN (No. 2), SJÖBERG (No. 2), URBAN (No. 2) and WARMELS (No. 2)

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr. Georges Meylan, Mrs. Britt Sjöberg, Mr. Ullrich Urban and Mr. Rein Warmels against the European Southern Observatory (ESO) on 11 May 1994 and corrected on 5 July and the Observatory's submissions of 12 October 1994 in reply;

Considering that by a letter of 26 September 1995 counsel for the complainants informed the Registrar of the Tribunal that they wished to withdraw suit;

Considering that by a letter of 4 October 1995 counsel for the Observatory informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded;

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

W^m Douglas
William Douglas

Mella Carroll
Mella Carroll

Egli

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re WASSEF (No. 11)

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 13 April 1995 and corrected on 11 May and the FAO's reply of 21 June 1995;

Considering that by a letter of 17 July 1995 the complainant informed the President of the Tribunal that he wished to withdraw suit;

Considering that in a letter of 1 August 1995 to the Registrar of the Tribunal the Organization expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

W. Douglas
William Douglas

Mella Carroll
Mella Carroll

Egli

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

A.B. Gardner
A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTIETH SESSION

In re WASSEF (No. 12)

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr. Maher Habib Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 20 April 1995 and corrected on 4 May and the FAO's reply of 21 June 1995;

Considering that by a letter of 17 July 1995 the complainant informed the President of the Tribunal that he wished to withdraw suit;

Considering that in a letter of 1 August 1995 to the Registrar of the Tribunal the Organization expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

W. Douglas
William Douglas

Mella Carroll
Mella Carroll

Egli

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

A.B. Gardner
A.B. Gardner

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INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO
CH-1211 GENÈVE 22

P. P.
1211 GENÈVE 22

O
UNITED